No. 05-8794	***** CAPITAL CASE *****
Title:	**Clarence E. Hill, Petitioner**
	v.
	James R. McDonough, Interim Secretary, Florida Department of Corrections, et al.
Docketed:	**January 24, 2006**
Lower Ct:	**United States Court of Appeals for the Eleventh Circuit**
Case Nos.:	**(06-10621)**
Decision Date:	**January 24, 2006**

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 24 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 23, 2006)
Jan 24 2006	Application (05A676) for a stay of execution, submitted to Justice Kennedy.
Jan 24 2006	Brief of respondent James V. Crosby, Secretary, Florida Department of Corrections, et al. in opposition filed. (Distributed)
Jan 24 2006	Application for stay (05A676) granted by Justice Kennedy pending further order of Justice Kennedy or of the Court.
Jan 25 2006	The motion to proceed in forma pauperis and the petition for a writ of certiorari are granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 6, 2006. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 3, 2006. The reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 17, 2006.
Jan 25 2006	Application (05A676) referred to the Court by Justice Kennedy.
Jan 25 2006	Application (05A676) granted by the Court.
Mar 3 2006	Brief amici curiae of Human Rights Advocates, et al. filed.
Mar 6 2006	SET FOR ARGUMENT on Wednesday, April 26, 2006.
Mar 6 2006	Brief amici curiae of Kevin Concannon, Dennis Geiser and Glen Pettifer filed.
Mar 6 2006	Motion for leave to file amici brief filed by Bradley A. MacLean and William P. Redick. (Distributed)
Mar 6 2006	Joint appendix filed.
Mar 6 2006	Brief of petitioner Clarence E. Hill filed.
Mar 6 2006	Brief amicus curiae of New Jerseyans for Alternatives to the Death Penalty filed.
Mar 6 2006	Brief amicus curiae of Darick Demorris Walker filed.
Mar 6 2006	Brief amicus curiae of Habeas Corpus Resource Center filed.

Mar 6 2006	Brief amici curiae of Physicians for Human Rights, et al. filed.
Mar 10 2006	Letter proposing a lodging received from counsel for amicus curiae New Jerseyans for Alternatives to Death Penalty.
Mar 17 2006	CIRCULATED.
Mar 20 2006	Motion for leave to file amici brief filed by Bradley A. MacLean and William P. Redick GRANTED.
Mar 28 2006	Record received from U.S.D.C. for Northern District of Florida. (1 envelope)
Mar 31 2006	Brief of respondents James R. McDonough, Interim Secretary, Florida Department of Corrections, et al. filed. (Distributed)
Apr 3 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 3 2006	Brief amici curiae of Alabama, et al. filed. (Distributed)
Apr 3 2006	Brief amicus curiae of United States filed. (Distributed)
Apr 3 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Apr 12 2006	Additional record received from U.S.D.C. for Northern District of Florida. (3 boxes)
Apr 12 2006	Motion to appoint counsel filed by petitioner Clarence E. Hill.
Apr 14 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 17 2006	Motion DISTRIBUTED for Conference of April 21, 2006.
Apr 17 2006	Reply of petitioner Clarence E. Hill filed. (Distributed)
Apr 24 2006	Motion to appoint counsel filed by petitioner GRANTED. D. Todd Doss, Esquire, of Lake City, Florida is appointed to serve as counsel for the petitioner in this case.
Apr 26 2006	Argued. For petitioner: D. Todd Doss, Lake City, Fla. (Appointed by this Court.) For respondents: Carolyn M. Snurkowski, Assistant Deputy Attorney General, Tallahassee, Fla.; and Kannon K. Shanmugam, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

(20)

Supreme Court, U.S.
FILED
JAN 24 2006
CLERK

05-8794

DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

CLARENCE EDWARD HILL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CAPITAL CASE
EXECUTION SCHEDULED FOR
JANUARY 24, 2006, 6:00 P.M.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?

2. Whether, under this Court's decision in Nelson, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

CLARENCE EDWARD HILL

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CAPITAL CASE
EXECUTION SCHEDULED FOR
JANUARY 24, 2006, 6:00 P.M.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, **CLARENCE EDWARD HILL**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review Order of the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals in this cause appears as Hill v. Crosby, Case No. 06-10621 (11th Cir. January 24, 2006), and is attached to this petition as Appendix A. The decision of the United States District Court, Northern District of Florida, Tallahassee Division appears as Hill v. State, Case No. 4:06-cv-032-SPM, and is attached to this petition as Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1257. The Eleventh Circuit Court of Appeals issued an opinion denying relief on January 24, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983

PROCEDURAL HISTORY

On November 2, 1982, Mr. Hill was indicted and charged with one count of first degree murder, one count of attempted first degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony. (R. 1440-41). Following a trial which commenced on April 27, 1983, the jury found Mr. Hill guilty of all the crimes charged. (R. 1662). Subsequently, the jury rendered an advisory sentence recommending death by a vote of ten to two, which the trial court imposed. (R. 1665, 1668-9).

Mr. Hill appealed his conviction to the Florida Supreme Court, which found that the trial court erred in denying Mr. Hill's challenge of a juror who was not impartial in his state of mind. The Court remanded the case for a new penalty phase with a new jury. Hill v. State, 477 So. 2d 553 (Fla. 1985).

Mr. Hill's new penalty phase was held on March 24, 1986. By a vote of eleven to one, the jury issued an advisory opinion for Mr. Hill's death on March 27, 1986. The circuit court sentenced Mr. Hill to death on April 2, 1986. (RS. 835).

Mr. Hill filed an appeal with the Florida Supreme Court, which affirmed his sentences. Hill v. State, 515 So.2d 176 (Fla. 1987). Mr. Hill then filed a Petition for a Writ of Certiorari before this Court, which was denied. Hill v. State, 108 S.Ct. 1302 (1988).

On November 9, 1989, the Governor of Florida signed a death warrant scheduling Mr. Hill's execution for January 25, 1990. Mr. Hill's counsel filed an expedited Motion to Vacate Judgments of Convictions and Sentences with Special Emergency Request for Leave to Amend on December 11, 1989. (PCR. 1-128). On January 18, 1990, the circuit court refused to grant Mr. Hill an evidentiary hearing and summarily denied Mr. Hill's motion.

On January 22, 1990, Mr. Hill appealed the order from the circuit court. (PCR. 387). Mr. Hill also filed a habeas corpus petition with the Florida Supreme Court. On January 26, 1990, the Florida Supreme Court denied all relief. Hill v. State, 556 So. 2d 1385 (Fla. 1990).[1]

Mr. Hill subsequently filed a Motion to Stay Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida on January 27, 1990. The district court granted a stay on January 28, 1990. On August 31, 1992, the district court granted relief to Mr. Hill on the grounds that the circuit court and the Florida Supreme Court failed to conduct a proper harmless error test when re-weighing the aggravating factors after eliminating the cold, calculating, and premeditating aggravator. Furthermore, the trial judge failed to find certain nonstatutory mitigating facts even though

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[1] Mr. Hill's execution was rescheduled for Monday, January 29, 1990 at 7:01 a.m.

mitigation was established by the record. The district court made no recommendation as to whether a new sentencing hearing had to be conducted.

Upon remand, Mr. Hill filed a motion to reopen his direct appeal to address the issues cited by the United States District Court. The Florida Supreme Court granted the motion, but upon re-weighing the four remaining aggravating factors against the one statutory mitigating circumstance of Mr. Hill's age and several non-statutory mitigating factors that were not previously considered, the court resentenced Mr. Hill to death. Hill v. State, 643 So. 2d 1071 (Fla. 1995).

Mr. Hill then filed an amended habeas corpus petition before the United States District Court challenging the decision of the Florida Supreme Court. The district court denied relief on the grounds that the Florida Supreme Court satisfied the dictates of Parker v. Dugger, 498 U.S. 308 (1991). Mr. Hill appealed this decision to the Eleventh Circuit Court of Appeals, which found that the district court had correctly decided Mr. Hill's claims. Hill v. Moore, 175 F.3d 915 (11th Cir. 1999). Mr. Hill subsequently filed a Petition for Writ of Certiorari before this Court, which was denied. See Hill v. State, 528 U.S. 1087 (2000).

Mr. Hill filed a successive Rule 3.850 motion in state court on June 20, 2003 pursuant to Ring v. Arizona, 536 U.S. 584

(2002). The circuit court denied said motion on May 26, 2004, and denied the motion for rehearing on June 21, 2004. Mr. Hill timely filed his appeal to the Florida Supreme Court, which was denied on May 13, 2005.

On November 29, 2005, Governor Jeb Bush signed a death warrant setting an execution date of January 24, 2006 at 6:00 p.m. Mr. Hill filed a successive 3.850 motion on December 15, 2005. Following a case management conference on December 19, 2005, the lower court orally denied Mr. Hill an evidentiary hearing on his claims for relief. A written order was issued on December 23, 2005.

On December 31, 2005, Mr. Hill filed a notice of appeal of the order from the circuit court. (PCR. 387). On January 17, 2006, the Florida Supreme Court denied all relief. Hill v. State, 2006 Fla. LEXIS 8 (January 17, 2006). On January 20, 2005, Mr. Hill filed a Petition for a Writ of Certiorari before this Court.

On Friday, January 20, 2006, Mr. Hill brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court, Northern District of Florida, Tallahassee Division. Mr. Hill alleged violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. On Saturday, January 21, 2006, the district court dismissed Mr. Hill's complaint for declaratory and injunctive relief for lack of jurisdiction.

On Monday, January 23, 2006, Mr. Hill filed a Notice of Appeal. On that same date, Mr. Hill filed in the Eleventh Circuit an Application for a Stay of Execution and for Expedited Appeal. The Eleventh Circuit denied Mr. Hill's Application on January 24, 2006.

FACTS RELEVANT TO QUESTIONS PRESENTED

In his complaint brought pursuant to 42 U.S.C. § 1983 in the United States District Court, Mr. Hill asserted that the defendants, acting under color of Florida law, are using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

Mr. Hill's claim was premised upon a recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Hill's Complaint) and three co-authors who detailed the results of their research on the effects of chemicals in lethal injections. See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the

scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.[1] The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Complaint, Att. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

As explained in the declaration of Dr. Lubarsky, sodium pentothal is an ultra-short acting substance which produces shallow anesthesia. (Complaint, Att. A). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the to patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium

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[1] Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty. (Complaint, Att. A).

pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Complaint, Att. A). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Complaint, Att. A).

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Complaint, Att. A). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his

arms, and his entire body so that he cannot express himself either verbally or otherwise. (Complaint, Att. A).

As explained by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Complaint, Att. A).

THE FEDERAL COURTS' RULINGS

In dismissing Mr. Hill's complaint for lack of jurisdiction, the district court stated:

> Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. Robinson, 358 F.3d at 1284. As such, he should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition.

Hill v. State, Case No. 4:06-cv-032-SPM, at 5.

In upholding the district court's order, the Eleventh Circuit Court of Appeals stated:

> It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it. See 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in Robinson, "such an application to

> file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied*, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

Hill v. Crosby, Case No. 06-10621 at 3:

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING THE ELEVENTH CIRCUIT'S DETERMINATION THAT MR. HILL'S CHALLENGE TO A PARTICULAR PROTOCOL WHICH THE STATE PLANS TO USE DURING THE EXECUTION PROCESS CONSTITUTES A SUCCESSIVE HABEAS CORPUS PETITION.

A. Uncertainty amongst the circuits

In Nelson v. Campbell, 541 U.S. 637 (2004), this Court addressed the parameters of an action under 42 U.S.C. § 1983, as a vehicle for challenging a procedure relating to an inmate's execution:

> We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution — *e.g.*, lethal injection or electrocution — fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the "conditions" nor the "fact or duration" label is particularly apt. A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence. Cf. *Weaver* v. *Graham*, 450 U.S. 24, 32-33, n. 17 (1981) (no *ex post facto* violation to change method of execution to more humane method). On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of

> execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. See *Calderon* v. *Thompson*, 523 U.S. 538, 556-557 (1998); *In re Blodgett*, 502 U.S. 236, 238 (1992) *(per curiam)*; *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Nelson, 541 U.S. at 643-4.

This Court concluded that it "need not reach here the difficult question of how to categorize method-of-execution claims generally." Id. at 644. Rather, in the specific case of a cut-down procedure, the Court stated:

> Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. Tr. of Oral Arg. 40 ("I don't disagree . . . that a cut-down occurring for purposes of venous access, wholly divorced from an execution, is indeed a valid conditions of confinement claim"); see also *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (citation omitted)). We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

Id. at 644-5.

Subsequent to Nelson, there has been dissension amongst the various federal circuits in determining to what extent, if any, a challenge to an execution procedure constitutes a colorable claim under 42 U.S.C. § 1983.

1. *Methods of execution can be challenged*

The Ninth Circuit Court of Appeals has determined that a § 1983 action is in fact a proper vehicle by which to challenge a method of execution. Beardslee v. Woodford, 395 F.3d 1064, 1068 (9th Cir. 2005).

2. *A particular protocol can be challenged*

The Fourth Circuit Court of Appeals, on the other hand, has permitted a § 1983 action where the Petitioner does not assert that lethal injection generally is an unconstitutional method of execution, but rather that the particular protocol the State plans to use is impermissible. Reid v. Johnson, 2004 U.S. App. LEXIS 15855, *6 (2004), stay vacated by Johnson v. Reid, 2004 U.S. LEXIS 4856 (2004)("In light of *Nelson*, we conclude that Reid has stated a cognizable claim under *§ 1983*. Like Nelson, Reid does not assert that lethal injection generally is an unconstitutional method of execution. Rather, he asserts only that the particular protocol the State plans to use is

impermissible; he acknowledges that other protocols would pass constitutional muster.").[1]

3. *Leaving the issue open*

However, the Fifth Circuit Court of Appeals has declined to directly address the issue, instead disposing of such claims on other grounds. See, e.g., Harris v. Johnson, 376 F.3d 414, 417 (5th Cir. 2004)("We do not decide whether Harris properly states a claim under *§ 1983*, because even if he does, he is not entitled to the equitable relief he seeks."). See also Aldrich v. Johnson, 388 F.3d 159, 161 (5th Cir. 2004)("Because Aldrich did not allege or show that there is any alternative to the protocol that the State proposes to use in his execution, the district court properly dismissed his *§ 1983* action.").

4. *Any challenge amounts to a successive habeas petition*

Finally, the Eleventh Circuit Court of Appeals has determined that:

> And as the panel observed in Robinson, "such an application to file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215

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[1]A United States District Court for the Second Circuit Court of Appeals has applied a similar logic. See Ross v. Rell, 392 F. Supp 2d 224, 226 (D.Ct. Conn. 2005)(note omitted)("The plaintiff here has not challenged the constitutionality of lethal injection in all cases, but only the specific protocol of drugs and attendant procedures used by the State of Connecticut as will be applied to Michael Ross. Therefore, the action properly may be construed as a *section 1983* claim and not a petition for habeas corpus relief.").

F.3d 1233, 1235-36 (11th Cir. 2000), cert. denied, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

Hill v. Crosby, Case No. 06-10621 at 3.

B. This Court should resolve the split in the circuits

Mr. Hill respectfully submits that this Court should grant certiorari in order to resolve the dissension amongst the circuits as to this issue.

C. Mr. Hill's complaint does not challenge a method of execution generally

In any event, Mr. Hill maintains that his complaint brought pursuant to 42 U.S.C. § 1983 does not fall into the category of "method-of-execution claims generally." Nelson, 541 U.S. at 644. As in Nelson, Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution.[1] ("[A] constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." Id. at 693-4). Rather, Mr. Hill is "seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the 'fact' or 'validity' of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence." Id. at 693-4. Here, it is the succession of chemicals to be

[1]In fact, the protocol utilized by the Department of Corrections is not part of any state statutory provision.

utilized, in accordance with the Department of Correction's protocol, which creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

The Eighth Amendment prohibits the substantial risk of punishments that "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of crue lty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," Id. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. Id. at 370 (emphasis added).

Mr. Hill submits that his complaint is a cognizable one under 42 U.S.C. § 1983, as explained by this Court in Nelson, and that the federal courts erroneously recharacterized it as a succesive habeas corpus petition.

CONCLUSION

Petitioner, Clarence Edward Hill, requests that certiorari review be granted.

Respectfully submitted,

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APPENDIX A

(PUBLISH)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
January 24, 2006
THOMAS K. KAHN
CLERK

No. 06-10621

CLARENCE E. HILL,

Plaintiff-Appellant,

versus

JAMES V. CROSBY, JR.,
CHARLIE CRIST,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Florida

(January 24, 2006)

Before EDMONDSON, Chief Judge, TJOFLAT and PRYOR, Circuit Judges.

BY THE COURT:

Appellant Clarence Edward Hill has been convicted of capital murder in Florida and sentenced to death. His execution is scheduled for today, January 24, 2006, at 6:00 p.m. On January 20, 2006, he applied to this court for leave to file a

second and successive habeas petition in an effort to forestall his execution. We denied his application in an order entered earlier today. At the same time, we denied his application under 28 U.S.C. §§ 1651 and 2251 for a stay of his execution.

Also on January 20, 2006, appellant brought this suit for declaratory and injunctive relief under 42 U.S.C. § 1983, in the United States District Court for the Northern District of Florida. He contends that death by lethal injection causes pain and unnecessary suffering and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. He seeks a permanent injunction barring his execution. On January 21, 2006, the district court issued an order dismissing appellant's complaint on the ground that the complaint "is the 'functional equivalent' of a successive habeas petition," and that the court lacked jurisdiction to entertain it in the absence of an order from the court of appeals granting appellant leave to file a successive petition.

The district court relied on as authority for its ruling our decision in Robinson v. Crosby, 358 F.3d 1281 (11th Cir. 2004), which, as the district court properly observed, dealt with "the very issue" appellant's complaint presents here. Appellant now appeals the district court's order, and he asks that we stay his execution pending our disposition of his appeal.

It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it. See 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in Robinson, "such an application to file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied*, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

For this reason, we DENY appellant's application for a stay of his execution pending appeal.

SO ORDERED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CLARENCE HILL.

Plaintiff,

v.

*****CAPITAL*****
Case No.: 4:06-cv-032-SPM

JAMES CROSBY, Secretary of the Florida Department of Corrections, in his official capacity; and CHARLES CRIST, JR., Attorney General, in his official capacity,

Defendants.
_____/

ORDER DISMISSING COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

THIS CAUSE comes before the Court upon the "Verified Complaint for Declaratory & Injunctive Relief" (doc. 2) and all accompanying attachments and appendices filed by Plaintiff through counsel on January 20, 2006, and the response from the Attorney General (doc. 6) also filed January 21, 2006. For the following reasons, the Court finds that the motion must be dismissed for lack of jurisdiction.

This case has a long history dating back to Plaintiff's original death sentence in May of 1983. The procedural history is set out in the Florida

Supreme Court's opinion of January 17, 2006, Hill v. State, 2006 WL 91302 (Fla. Jan. 17, 2006), demonstrating that Plaintiff has filed previous petitions for habeas corpus, both in the federal and state courts. *See, e.g.*, Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990); Hill v. Moore, 175 F.3d 915 (11th Cir. 1999); Hill v. Butterworth, 941 F. Supp. 1129 (N.D. Fla. 1996).

Plaintiff now brings the instant suit as a motion for declaratory and injunctive relief under 42 U.S.C. § 1983 for alleged prospective violations of his right to be free from cruel and unusual punishment (doc. 2-1 at 2), claiming that death by lethal injection causes pain and unnecessary suffering. In support of his claim, Plaintiff points to "newly-discovered evidence" in the form of an article from the medical journal The Lancet, which purportedly found that inmates (in the cases studied by the researchers) had felt pain during their executions due to insufficient amounts of anesthetic in their bloodstream. Plaintiff seeks a permanent injunction barring the execution of his death sentence.

This very issue was dealt with by the Eleventh Circuit in Robinson v. Crosby, 358 F.3d 1281 (11th Cir. 2004). In Robinson, the appellant filed a § 1983 action in the Middle District of Florida alleging that "lethal injection causes those who are executed pain and suffering while they are paralyzed and unable to communicate." Id. at 1282. The district court dismissed the petition for lack of jurisdiction, holding that the appellant's § 1983 action was the functional equivalent of a successive habeas corpus petition, which would subject him to the authorization requirements of 28 U.S.C. § 2244. Absent the permission of

the Eleventh Circuit, the appellant was not authorized to file a successive petition, and thus the district court lacked jurisdiction to consider it. Id. at 1283-84.

The Eleventh Circuit explicitly upheld the district court's finding:

> We conclude that the district court correctly dismissed Robinson's § 1983 complaint for lack of jurisdiction. A § 1983 claim seeking relief--including a TRO, preliminary injunction, or a stay of execution--from a sentence of death as cruel and unusual punishment is the "functional equivalent" of a successive habeas petition. The district court lacked jurisdiction to consider Robinson's claim because he failed to apply to this Court for permission to file a successive habeas petition. We further note that such an application to file a successive habeas petition would be due to be denied in any event. *See In re* Provenzano, 215 F.3d 1233, 1235-36 (11th Cir.2000), *cert. denied*, 530 U.S. 1256 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B)).

Id. at 1284 (remaining internal citations omitted). Plaintiff's claim, like that of the appellant in Robinson, is virtually identical to those raised in other cases in which stays of execution have been denied. Id. at 1283 (*citing In re* Roe, 540 U.S. 1171 (2004); Vickers v. Johnson, 540 U.S. 1170 (2004); Zimmerman v. Johnson, 540 U.S. 1087 (2003); *and* Beck v. Rowsey, 540 U.S. 1098 (2004) (Supreme Court vacated stay entered by district court)).

Plaintiff's claim of "newly-discovered evidence" is insufficient to overcome the procedural bar in this case. Plaintiff cites the Lancet article as conclusive proof that inmates do feel pain during the lethal injection procedure. He details the injection process, noting that sodium pentothal is first administered as an anesthetic, followed by pancuronium bromide, a paralytic agent which prevents

the inmate from moving or otherwise showing pain or discomfort. The final chemical to be injected is potassium chloride, which causes the actual death by stopping all movement of the heart and suffocating the inmate. The Lancet researchers found that toxicology reports in their case studies demonstrated that insufficient amounts of anesthetic were injected, permitting the inmates to experience the feelings of being suffocated and having a heart attack, yet remaining paralyzed by the pancuronium. While Florida's procedure was not examined in the study, Plaintiff argues that Florida's practice is "substantially similar" and thus poses the same risk to inmates.

These exact issues were raised and disposed of in Robinson, in which the Eleventh Circuit referred to affidavits filed in that case addressing "the effects of the drugs used during lethal injection, how they each cause pain and suffering, and particularly how the pancuronium bromide chemical paralyzes the person and masks the pain and suffering being incurred." Id. at 1285 n.4. An additional affidavit "discusse[d] how the level of potassium chloride being used in the lethal injection context may not cause actual cardiac arrest but may result in death by suffocation due to lack of oxygen." Id.

While the Lancet article itself may be new, having just been published last year, the factual basis of Plaintiff's claim has certainly been raised and disposed of in numerous cases, both in Florida and in other states. Plaintiff has made no showing that he could not have discovered these underlying predicates through the exercise of due diligence. *See in re* Provenzano, 215 F.3d 1233, 1236-37

(11th Cir 2000)

Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. Robinson, 358 F 3d at 1284 As such, he should have first sought the permission of the Eleventh Circuit under 28 U S C § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's complaint/motion for declaratory and injunctive relief (doc. 2) is hereby *dismissed* for lack of jurisdiction. No stay of execution shall issue in this case

DONE AND ORDERED this twenty-first day of January, 2006

/s/ Stephan P. Mickle

Stephan P. Mickle
United States District Judge

pac

The Supreme Court of Florida also noted in its opinion that

> [a]cross the nation, courts have rejected claims that The Lancet study requires a new evaluation of the constitutionality of lethal injection. See Brown v. Crawford, 408 F 3d 1027 (8th Cir 2005) (dismissing an appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S C § 1983 in part on The Lancet study at issue here); Baeghler v. State, 839 N E 2d 691 (Ind 2005) (finding The Lancet study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution")

2006 WL at *6

Supreme Court, U.S.
FILED
JAN 24 2006
CLERK

Case No. 05-8794

CAPITAL CASE UNDER ACTIVE WARRANT

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE EDWARD HILL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI AND STAY OF EXECUTION

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QUESTIONS PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN REJECTING HILL'S 42 U.S.C. §1983 CLAIM REGARDING THE VALIDITY OF LETHAL INJECTION AS A METHOD OF EXECUTION IN FLORIDA?

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WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN REJECTING HILL'S 42 U.S.C. §1983 CLAIM REGARDING THE VALIDITY OF LETHAL INJECTION AS A METHOD OF EXECUTION IN FLORIDA?

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Case No. 05-8794

CAPITAL CASE UNDER ACTIVE WARRANT

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE EDWARD HILL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit appears as Hill v Crosby, 2006 U.S. App. LEXIS -- (11th Cir. Jan. 24, 2006).

JURISDICTION

Petitioner invokes this Court's jurisdiction to review the denial of Hill's 42 U.S.C. §1983 action in this capital case presently set for execution January 24, 2006 at 6:00 P.M.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional provisions involved.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Clarence Hill and his accomplice, Cliff Jackson, robbed a Savings and Loan Association in Pensacola, Florida, on October 19, 1982. In Hill's attempt to escape and prevent the immediate apprehension of his co-defendant, Hill stealthily approached the police officers attempting to handcuff Jackson, drew his gun and shot both officers, killing one and wounding the other. Hill was indicted on November 2, 1982, for the first-degree murder of Officer Stephen Taylor, attempted first-degree murder of Officer Larry Bailly, three counts of armed robbery and possession of a firearm during the commission of a felony. On April 29, 1983, with the jury convicted Hill of both first-degree murder and felony murder as alleged in Count I. Following sentencing phase, the jury returned a 10-2 death recommendation and on May 17, 1983, the trial court concurred. The Florida Supreme Court affirmed Hill's convictions, but reversed the death sentence. Hill v. State, 477 So.2d 553 (Fla. 1985).

Resentencing occurred on March 24-27, 1986. A number of witnesses testified in behalf of Hill in mitigation. The defense

presented five character witnesses besides Hill's parents.[1] Additionally, Dr. James Larson, a psychologist who examined Hill on December 22, 1982, to ascertain whether Hill suffered from any mental disability; whether there was any need for involuntary hospitalization and for purposes of discovering any evidence in mitigation, was called. Dr. Larson concluded Hill was of average intelligence but scored borderline retarded when it came to verbal ability; he found no evidence of mental disorder of psychosis; he reviewed a plethora of school and medical records and found nothing in the records that Hill suffered from any mental dysfunction. Following all of the testimony, the jury recommendation death 11-1. The trial court determined death was the appropriate sentence.[2] The Florida Supreme Court, on appeal, affirmed the reimposition of

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[1] This testimony in sum reflects that Hill, at various points in his life, was a nice boy and very pleasant. He was helpful to his parents and neighbors and none of the witnesses believed he committed the murder. The State's objections were sustained with regard to efforts by defense counsel to permit Hill's mother to testify concerning how she cared for children when Hill was growing up. The State's objection was also sustained as to the testimony of Hill's father regarding the father's disability from a recent heart attack.

[2] The court found based upon five (5) statutory aggravating factors: (1) that Hill had previously been convicted of another capital offense or violent felony; (2) Hill knowingly created a great risk of harm or danger to many persons; (3) the murder was committed while Hill was engaged in the commission of a robbery; (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest or escaping from custody, and (5) the murder was cold, calculated and premeditated; and only one (1) mitigating factor, that Hill was twenty-three years old at the time the crime was committed, articulated in the sentencing order.

the death penalty in Hill v. State, 515 So.2d 176 (Fla. 1987), cert. denied, 485 U.S. 993 (1988), however the court struck the CCP aggravator.

On November 9, 1989, the Governor signed a death warrant scheduling Hill's execution for January 25, 1990. Hill filed his initial motion for post-conviction relief in the trial court on December 11, 1989, asserting fifteen (15) claims.[3]

---

[3] Hill timely filed a motion for post-conviction relief on the following grounds: (1) the prosecutor peremptorily excused black prospective jurors solely based upon their race, in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and article one, section 16, of the Florida Constitution, and appellate counsel was ineffective in not arguing this issue on direct appeal; (2) the trial court erred when it responded to questions from the jury and refused to disclose to Hill and his counsel the questions asked, in violation of Hill's fifth, sixth, eighth, and fourteenth amendment rights; (3) Hill's capital trial and sentencing proceedings were rendered fundamentally unfair and unreliable, and violated the fifth, sixth, eighth, and fourteenth amendments, due to the prosecution's deliberate and knowing presentation and use of false evidence and arguments and its intentional deception of the jury, the court, and defense counsel; (4) Hill was denied the effective assistance of counsel at the guilt-innocence phase of his trial, in violation of the sixth, eighth, and fourteenth amendments; (5) Hill was denied the effective assistance of counsel at the sentencing phase of his trial, in violation of the sixth, eighth, and fourteenth amendments; (6) Hill's sixth, eighth, and fourteenth amendment rights were violated because counsel unreasonably failed to present critical mitigating evidence and failed to adequately develop and employ expert mental health assistance, and because the experts retained at the time of trial failed to conduct professionally adequate mental health evaluations; (7) the cold, calculated, and premeditated aggravating circumstance was applied to Hill's case, in violation of the eighth and fourteenth amendments; (8) this Court's failure to remand for resentencing after striking an aggravating circumstance on direct appeal denied Hill the protections afforded under Florida's capital sentencing statute, in violation of due process, equal protection, and the eighth and fourteenth amendments; (9) Hill was denied his eighth and fourteenth amendment rights because the jury was not properly instructed concerning the improper doubling of aggravating factors; (10) Hill's death sentence was imposed in violation of the eighth and fourteenth amendments because his jury was prevented from giving appropriate consideration to, and his trial judge refused to consider, all evidence proffered in mitigation of punishment, contrary to *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982), *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L. Ed. 384 (1988) and *Hitchcock* v. *Dugger*, 481 U.S. 393,

107 S.Ct. 1821, 95 L. Ed. 2d 384 (1987), (11) during the course of Hill's trial the court improperly stated that sympathy and mercy toward Hill were improper considerations, in violation of the eighth and fourteenth amendments; (12) Hill's sentence of death was based upon an unconstitutionally obtained prior conviction and therefore upon misinformation of constitutional magnitude, in violation of the eighth and fourteenth amendments; (13) Hill's jury was improperly instructed, resulting in fundamentally unfair convictions and sentences, in violation of the fifth, eighth, and fourteenth amendments; (14) Hill's sentence of death violates the fifth, sixth, eighth, and fourteenth amendments because the penalty phase jury instructions shifted the burden to Hill to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Hill to death; and (15) the application of rule 3.851 to Hill's case will violate, and the present warrant has violated, his rights to due process and equal protection of the law and denied him his right of reasonable access to the courts. Hill v. State, 556 So.2d 1385, 1387 (Fla. 1990).

On January 18, 1990 Hill's postconviction motion was denied without evidentiary hearing, and an appeal therefrom was also decided adversely to Hill.[4] Hill v. Dugger, 556 So.2d 1385 (Fla. 1990).

On January 7, 1990, Hill filed his federal petition for writ of habeas corpus, asserting eighteen (18) claims.[5] Relief was denied as to all claims "except for two issues".[6]

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[4] Hill raised fourteen (14) claims for review on appeal from the summary denial of all relief. The Florida Supreme addressed three issues specifically, finding that the additional evidence of Hill's substance abuse did not rise to a level of objectively establishing a head injury and therefore, was merely cumulative evidence; trial counsel was not ineffective based on the allegations presented; and appellate counsel did not render ineffective assistance for failing to assert on appeal alleged improper peremptory excusal by the state of prospective black jurors based on the status of the law at the time.

The Florida Supreme Court also rejected the nine (9) issues raised in the habeas corpus contemporaneously thereto.

[5] On January 28, 1990, the U.S. District Court stayed Hill's scheduled execution.

[6] On August 31, 1992, District Court Judge Stafford granted Hill's federal Petition for Writ of Habeas Corpus based on Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), and Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), violations, in Hill v. Singletary, Case no. TCA 90-40023-WS.

Hill continued to prosecute his appeal in the Eleventh Circuit Court of Appeals, however, when the time came for filing his Initial Brief, he filed a motion to have the matter held in abeyance in that Court until such time, as the issues upon which he prevailed, were resolved by the state courts.

The case returned to the Florida Supreme Court on a limited remand for the purpose of ascertaining whether the striking of one of the statutory aggravating factors (CCP) and factoring in

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"unrebutted", nonstatutory mitigating evidence would have resulted in the imposition of the death penalty. The issue before the Florida Supreme Court was what effect the "unrebutted nonstatutory mitigation" tendered by Hill would have had if four, rather than five, statutory aggravating factors were presented to the trial court and whether, the aforenoted omissions constituted harmless error.

The direct appeal was reopened on a limited basis in Hill v. Florida, 643 So.2d 1071 (Fla. 1994):

> Hill raises eleven claims in this appeal,[2] only one of which deals with the Parker issue. Hill maintains that all eleven claims are properly before this Court because the federal district court found constitutional error that 'infected' Hill's sentence, thus effectively reopening his direct appeal as to any issue, the State maintains that all but the Parker issues are procedurally barred.
>
> In granting Hill's motion to reopen his direct appeal, we accepted jurisdiction for the limited purpose of considering the federal district court's partial grant of his habeas petition. In no way did we intend to reopen Hill's direct appeal for the purpose of allowing him to raise other issues that are procedurally barred either because he previously failed to raise them on direct appeal or because the issues were previously determined to be without merit. Consequently, we limit our consideration in this appeal to the Parker issue and decline to consider the other issues raised by Hill.
>
> ---
>
> [2] Hill claims that: (1) the judge's and jury's application of cold, calculated, and premeditated was harmful error; (2) the trial judge erred in failing to weigh nonstatutory mitigating evidence; (3) the failure to properly instruct the jury on the improper doubling of aggravating factors warrants a new penalty phase proceeding; (4) irrelevant and inflammatory evidence perverted the penalty phase proceedings; (5) blacks were erroneously excluded from the jury solely on the basis of race; (6) the trial judge erroneously responded to questions from the jury and refused to disclose to Hill the content of the questions; (7) the trial judge erroneously refused to allow Hill to present certain mitigating evidence; (8) the trial judge erroneously refused to excuse certain jurors; (9) the jury instruction shifted the burden to Hill to prove death was inappropriate and the court used the wrong standard in sentencing Hill; (10) the jury's sense of responsibility

> was diluted because it was told that its decision was merely advisory; and (ii) the jury was improperly instructed regarding the offenses for which Hill was charged. 643 So.2d at 1073.

Following remand, the district court concluded that the Florida Supreme Court had satisfied the dictates of Parker, and denied relief. (Order dated November 20, 1996.) The Eleventh Circuit affirmed the district court's denial of all relief in Hill v. Moore, 175 F.3d 915 (11th Cir. 1999), cert. denied, 528 U.S. 1087 (2000).

On or about June 20, 2003, Hill filed a successive motion for post-conviction relief, and on May 26, 2004, the trial court denied the four-prong attack regarding the application of Ring v. Arizona, 536 U.S. 584 (2002). The Florida Supreme Court denied appellate review Hill v. State, 904 So.2d 430 (Fla. 2005).

The Governor signed a new death warrant on November 28, 2005, setting the warrant week to run from noon, Monday, January 23, 2006, through noon, Monday January 30, 2006, with the execution set for Tuesday, January 24, 2006, at 6:00 P.M.

On December 15, 2005, Hill filed the latest postconviction litigation in the trial court, raising six (6) claims. On December 23, 2005, the trial court denied all relief.[7]

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[7] The Court found Claims I (Lethal Injection), II (Mental Retardation), III (Mental Age per Roper v. Simmons), V (Shackling), and VI (Reconsideration of prior 3.850), procedurally barred; and Claim IV (Public Records) Hill's state request for records was satisfied or no colorable basis for postconviction relief was presented, based on the additional public records request outside Rule 3.852(h) Fla.R.Crim.P.

All relief was denied January 17, 2006, when the Florida Supreme Court found that Hill's claims were either procedurally barred or failed to raise a claim upon which relief was warranted. Hill v. State, 2006 Fla. LEXIS 8 (Fla. 2006).

On January 20, 2006, Hill filed a 42 U.S.C. §1983 action in Hill v. Crosby, Case No.:4:06-cv-032-SPM, in the United States District Court, Northern District, asserting that Hill's right to be free from "cruel and unusual punishment under the Eighth and Fourteenth Amendments" are in jeopardy because of the new evidence from The Lancet article regarding lethal injection. The court dismissed the 42 U.S.C. §1983 action, January 21, 2006. Hill appealed to the Eleventh Circuit on January 23, 2006 and the Eleventh Circuit denied Hill's appeal on January 24, 2006.

(ii) Statement of the Facts

The facts as found by the Florida Supreme Court in Hill, 477 So.2d 553, 554 (Fla. 1985) are as follows:

> On October 19, 1982, appellant stole a pistol and an automobile in Mobile, Alabama. Later that day, appellant and his accomplice, Cliff Jackson, drove to Pensacola and robbed a savings and loan association at gunpoint. When the police arrived during the robbery, appellant fled out the back of the savings and loan building. Jackson exited through the front door, where he was apprehended immediately. Appellant approached two police officers from behind as they attempted to handcuff Jackson. Testimony established that appellant drew his pistol and shot the officers, killing one and wounding the other. A gun battle ensued, during which appellant received five bullet wounds.

REASONS FOR DENYING THE WRIT

QUESTIONS PRESENTED (RESTATED)

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN REJECTING HILL'S 42 U.S.C. §1983 CLAIM REGARDING THE VALIDITY OF LETHAL INJECTION AS A METHOD OF EXECUTION IN FLORIDA?

Lethal Injection Under 42 U.S.C. §1983 Action

Hill, a state prisoner under a sentence of death, filed his "Petition Under 42 U.S.C. §1983 on January 20, 2006. The State responded that same day and on January 21, 2006, the district court dismissed the action in an Order Dismissing Complaint For Declaratory and Injunctive Relief and denied any stay. Hill appealed on January 23, 2006, and the Eleventh Circuit on January 24, 2006, denied relief.

Hill sought extraordinary appellate review of the denial of this "expedited" action brought pursuant to 42 U.S.C. §1983, contending that he is entitled to relief because the State will use a succession of "three chemicals that will cause unnecessary pain in the execution of sentence of death" on or about January 24, 2006.

Procedurally below, Hill did not identified what administrative remedies he claims were exhausted, albeit he protested below that he exhausted "all avenues". The United States Supreme Court in Nelson v. Campbell, 541 U.S. 637, 643 (2004), contemplated that §1983 "must yield to the more specific federal habeas statute, with its attendant procedural

and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." See 42 U.S.C. §1997e(a).[8]

Hill has **proven** the "caveat" set forth by the Court in Nelson, supra., that claims based on speculation **do not** state a cause of action upon which relief may be granted:

> Finally, the ability to bring a §1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C.

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[8] The very language Hill used to answer the "V. Exhaustion of Administrative Remedies" in the district court, reflects he was merely attempting to get around successive federal habeas corpus hurdles in his declaration that "Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." In Hill's successive postconviction, state court litigation, he identified the last 16 executions by lethal injection in Florida as possible sources of information to "perfect" this argument.

§3626(a)(1) [18 USCS §3626(a)(1)]; accord, §3626(a)(2). **It requires that inmates exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of their confinement.** 110 Stat 1321-71, 42 U.S.C. §1997e(a) [42 USCS §1997e(a)] ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"). **The Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted,** or seeks monetary relief from a defendant who is immune from relief." §1997e(c)(1). Indeed, if the claim is frivolous on its face, a district court may dismiss the suit before the plaintiff has exhausted his state remedies. §1997e(c)(2).

Nelson, 541 U.S. 649 (Emphasis added).

Hill clearly sought to circumvent federal habeas corpus review under 28 U.S.C. §2244 by filing his §1983 action, the sole purpose of which was to

stop any execution. As observed in Nelson v. Campbell, 541 U.S. 637, 644 (2004)(Emphasis added),

> A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself--by simply altering its method of execution, the State can go forward with the sentence. Cf. Weaver v. Graham, 450 U.S. 24, 32-33, n. 17, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981) (no ex post facto violation to change method of execution to more humane method). **On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. See Calderon v. Thompson, 523 U.S. 538, 556-557, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); In re Blodgett, 502 U.S. 236, 238, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) (*per curiam*); McCleskey v. Zant, 499 U.S. 467, 491, 113 L. Ed.**

2d 517, 111 S. Ct. 1454 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Unlike Nelson, Hill is not questioning whether a particular procedure personal to him,[9] is unnecessary to complete his execution. Rather Hill points to a recent research

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[9] In Nelson, 541 U.S. at 646, the Court observed: "If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. **But petitioner has been careful** throughout these proceedings, **in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled.** App. 17 (complaint) (proffering as "less invasive, less painful, faster, cheaper, and safer" the alternative procedure of "percutaneous central line placement"); id., at 37-38 (affidavit of Dr. Mark Heath) (describing relative merits of the cut-down and percutaneous central line placement). No Alabama statute requires use of the cut-down, see Ala. Code §15-18-82 (Lexis Supp. 2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.

paper published in THE LANCET, which "hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. See Koniaris et al., supra. at 1413. The study ultimately concludes that ' public review of lethal injection is warranted.' Id. at 1414." See Hill v. State, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Specifically, the "letters" provide in conclusion:

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review **might have** led to the unnecessary suffering of at least **some** of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia **cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted.**"

Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412, 1414 (2005)(Emphasis added).

In denying a stay of execution in a Missouri capital case, wherein Brown brought an identical 42 U.S.C. §1983 action, the Eighth Circuit rejected Dr. Lubarsky's THE LANCET paper, Brown v. Crawford, 408 F.3d 1027 (8th Cir. May 17, 2005), cert. denied, Brown v. Crawford, 162 L.Ed.2d 310, 125 S.Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005). In his dissent, Circuit Judge Bye states that the

issue in Brown, "challenges the chemical protocol used by Missouri to carry out lethal injections. He contends the three-chemical sequence used by Missouri - sodium pentothal, pancuronium bromide, and potassium chloride - creates a foreseeable risk of the gratuitous infliction of unnecessary pain and suffering in violation of the Eighth Amendment."[10]

Hill raised as part of his December 15, 2005, successive state court postconviction litigation the issue of whether "new evidence" has come to light based on "research letters" published in THE

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[10] The dissent also succinctly reports what the specific issue was in Brown,

> "Brown's §1983 action is based in part upon a recently-published article. See L.G. Koniaris, M.D., Inadequate anaesthesia in lethal injection for execution, 365 The Lancet 1412 (Apr. 16, 2005). This article appears to be the first published empirical research showing the three-chemical process used by some states to carry out lethal injections has the possibility of causing unnecessary cruelty and suffering. The study outlined in the article analyzed autopsy toxicology results from forty-nine executions carried out in Arizona, Georgia, North Carolina and South Carolina. The authors conclude in twenty-one of those cases - or 43% - the post-mortem levels of thiopental (sodium pentothal) were consistent with consciousness. In other words, the deceased was likely conscious when the potassium chloride was administered."

LANCET, that evidenced empirical data that execution by lethal injection might be flawed. The state trial court and Florida Supreme Court rejected the very argument made in his federal §1983 pleadings. Hill v State, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006), citing Sims, the court held: "The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. Sims, 754 So.2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in Sims, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. Id. at 668." (Footnote omitted).

This Court also recently rejected this identical claim in other cases under warrant challenging lethal injection--Brown v. Crawford, 162 L.Ed.2d 310, 125 S.Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005), and Donald Jones v. Purkett, 04A-912, (April 26, 2004); Hicks v. Taft, 05A-487 (November 29, 2005); Johnston v. Roper, 05A-206 (August 30, 2005).

Moreover in other post-Nelson, cases from the Fifth Circuit, Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004), and White v. Johnson, 429 F.3d 572 (5th Cir. 2005), the court held:

> The district court *sua sponte* dismissed White's action for equitable relief because it determined that, just like the plaintiff in Harris v. Johnson, 376 F.3d 414 (5th Cir. 2004), White waited too long to bring his §1983 claim. We review the district court's *sua sponte* dismissal de novo. Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998).

"Method of execution actions may be brought in a §1983 suit instead of a habeas petition," but the §1983 claim should "not unduly threaten the State's ability to carry out the scheduled execution." Harris, 376 F.3d at 416 (citing Nelson v. Campbell, 541 U.S. 637, 643-48, 124 S. Ct. 2117, 2123-25, 158 L. Ed. 2d 924 (2004)). Additionally, the fact that "an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right," and "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Nelson, 541 U.S. at 649, 124 S. Ct. at 2125-26 (citing Gomez v. United States Dist. Court., 503 U.S. 653, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992) (*per curiam*)). White argues that because he is not requesting a stay, the Supreme Court's pronouncements in Nelson should not apply. These rules, however, were declared by the Court in the context of last-minute §1983 method of execution challenges as well as last-minute stay requests. Id. The principles enunciated by the Court are equally applicable to all types of equitable relief, including permanent injunctions, sought by inmates facing imminent execution.

When weighing equitable remedies, a court "must take into consideration the State's strong interest in proceeding with its judgment and . . . attempts at manipulation." Id. Further, "given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against" last-minute equitable remedy requests. See id. at 650, 124 S. Ct. at 2126. This presumption occurs because the inmate could have brought the action at an earlier time, which would have allowed the court to consider the merits without having to utilize last-minute equitable remedies. See id.

As in Harris, "we do not decide whether [White] properly states a claim under §1983, because even if he does, he is not entitled to the equitable relief he seeks" due to his dilatory filing. 376 F.3d at 417 (citing Gomez, 503 U.S. at 654, 112 S. Ct. 1652). White has been on death row for more than six years, and only now, with his execution imminent, has decided to challenge a procedure for lethal injection that the State has been using for his entire stay on death row. See Harris, 376 F.3d at 417. Like Harris, White has no excuse for delaying his claim until the eleventh hour, and he cannot argue that "he was unaware of the State's intention to execute him by injecting the three chemicals he now challenges." Id. n1

> n1 Additional hurdles face White's complaint that, because the State might use a cut-down procedure to gain venous access, he will be subject to an Eighth Amendment violation. First, it is counter-factual, as the State denies it will resort to this procedure, and White concedes that IV access has been achieved in his hands several times. Second, this claim is

> barred from federal review by White's failure to exhaust it pursuant to the PLRA. See, Underwood v. Wilson, 151 F.3d 292 (5th Cir. 1998).

White, 429 F.3d at 573-74. See also Aldrich v. Johnson, 388 F.3d 159 (5th Cir. 2004) (In the present case, Aldrich's §1983 action challenges the constitutionality of the protocol that Texas will use to execute him, but he does not allege that there is any specific acceptable alternative method that the state could use, or that the proposed protocol is wholly unnecessary to the execution. Thus, contrary to the situation in Nelson, Aldrich's §1983 claim challenging the constitutionality of that protocol and stay of its usage will effectively prevent the state from carrying out his execution. Nelson's holding clearly requires that a capital defendant, in order to assert a §1983 method-of-execution claim, must allege that, because there are alternative methods of execution, the challenged protocol is wholly unnecessary to proceeding with the execution. n11 Because Aldrich did not allege or show that there is any alternative to the protocol that the State proposes to use in his execution, the district court properly dismissed his §1983 action.); and the Sixth Circuit in Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005); Williams v. Bagley, 380 F.3d 932 (6th Cir. 2004) (where similar challenges to the lethal injection method has been litigated).

Terminally in Nelson, 541 U.S. at 649-50:

> Moreover, as our previous decision in Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 118 L.Ed.2d 293, 112 S.Ct. 1652 (1992) (per curiam), makes clear, the mere fact that an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right. Gomez came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute §1983 action challenging the constitutionality of California's use

of the gas chamber. We left open the question whether the inmate's claim was cognizable under §1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Id., at 654, 118 L.Ed.2d 293, 112 S.Ct. 1652.

A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." Ibid. Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, see Blodgett, 502 U.S., at 239, 116 L.Ed.2d 669, 112 S.Ct. 674; McCleskey, 499 U.S., at 491, 113 L.Ed.2d 517, 111 S.Ct. 1454, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

In the instant case Hill's "action" should be dismissed. And even assuming *arguendo*, that he has somehow met the Nelson, supra. test setting forth an independent §1983 action, no stay or relief should be obtained.

As previously noted, Hill asserted the identical arguments in his certiorari petition pending before the Court in Hill v. State,

Case no. 05-8731, filed on or about January 20, 2006, from the denial of postconviction review by the Florida Supreme Court.

The Florida Supreme Court rejected the argument in Hill v. State, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006).

> Hill's claim is that a research letter published in April 2005 in The Lancet presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. See Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided Sims v. State, 754 So. 2d 657 (Fla. 2000). The trial court denied this claim. We agree.

See also, Bieghler v. State, 2005 Ind. LEXIS 1156 (Ind. Dec. 28, 2005), the Indiana Supreme Court likewise rejected the defendant's challenge regarding Indiana's method of execution by lethal injection based on The Lancet research letters.[11]

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[11] Bieghler cites no authority for the proposition that he is entitled to a "pain free" execution, and we have found none. Compare Johnson v. State, 584 N.E.2d 1092, 1107 (Ind. 1992) (fact that electrocution may not cause instantaneous and painless death does not mean that method involves the unnecessary and wanton infliction of pain).

> Both the federal and state constitutions prohibit "cruel and unusual punishment." Punishment may not include torture, lingering death, or the unnecessary and wanton infliction of pain; the method must be compatible with contemporary standards of society. See, e.g., Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251

(1976); accord Moore v. State, 771 N.E.2d 46, 55-56 (Ind. 2002). Claims that lethal injection violates the prohibition against cruel and unusual punishment have been rejected by courts throughout the county in states that appear to have a drug protocol the same as or similar to Indiana's. See, e.g., Beardslee v. Woodford, 395 F.3d 1064, 1076 (9th Cir. 2005), cert. denied, 125 S. Ct. 982, 160 L.Ed.2d 910 (2005); Cooper v. Rimmer, 379 F.3d 1029, 1031-33 (9th Cir. 2004); Reid v. Johnson, 333 F.Supp.2d 543, 552-53 (E.D. Va. 2004); State v. Webb, 252 Conn. 128, 750 A.2d 448, 454-56 (Conn. 2000), cert. denied, 531 U.S. 835, 121 S.Ct. 93, 148 L.Ed.2d 53 (2000); Sims v. State, 754 So.2d 657, 666-68 (Fla. 2000), cert. denied, 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1122 (2000); Morrow v. State, 21 S.W.3d 819, 828 (Mo. 2000), cert. denied, 531 U.S. 1171, 121 S.Ct. 1140, 148 L.Ed.2d 1004 (2001); Abdur' Rahman v. Bredesen, 2005 Tenn. LEXIS 828, 2005 WL 2615801, *9-*12 (Tenn. Oct. 17, 2005) (noting that lethal injection is "commonly thought to be the most humane form of execution"); see also McConnell v. State, 102 P.3d 606, 615-17 (Nev. 2004) (the absence of a codified protocol does not render lethal injection an unconstitutional method of execution absent some showing that executions in the state have been administered in a cruel or unusual manner). But see Harris v. Johnson, 323 F.Supp.2d 797, 809 (S.D. Tex. 2004) (concluding prisoner showed likelihood of success sufficient to support a temporary restraining order), vacated, 376 F.3d 414 (5th Cir. 2004) (determining prisoner had unreasonably delayed bringing challenge to execution method).

We have previously rejected claims that lethal injection is cruel and unusual punishment. See, e.g., Johnson v. State, 827 N.E.2d 547, 552-53 (Ind. 2005) (order denying permission to litigate successive post-conviction claims in capital case); Ritchie v. State, 809 N.E.2d 258, 262-63 (Ind. 2004); Moore, 771 N.E.2d at 55-56 (observing that executions must "be performed in a manner that avoids unnecessary or wanton infliction of pain" but concluding that lethal injection does not constitute wanton infliction of pain). We have also noted that "judicial intervention in the details of execution methods is by its nature highly restrained." Benefiel v. State, 716 N.E.2d 906, 918 n.8 (Ind. 1999).

Bieghler has not shown a reasonable possibility of succeeding on his claim because, even if Indiana's protocol was developed without input from a person trained in clinical anesthesiology, Bieghler has not shown the protocol presents any unacceptable risk of a lingering death or the wanton infliction of pain in his case. In this respect, his claim is like the others we have rejected. See Johnson, 827 N.E.2d at 552-53 (rejecting challenge to the drug protocol); Ritchie, 809 N.E.2d at 262-63 (rejecting prisoner's unsupported assertion that lethal injection inflicts "unnecessary pain"); Moore, 771 N.E.2d at 55 n.3 (rejecting prisoner's unsubstantiated contention that his obesity and resulting difficulty in locating a suitable vein would present difficulty in his case). In view of this decision, we do not address the State's argument that this claim is procedurally defaulted because Bieghler waited too long to raise it.

In Hill's postconviction sojourn, he contended that "new evidence" has come to light which brings into question the State Court's holding in Sims v. State, 754 So.2d 657 (Fla. 2000), cert. denied, 754 U.S. 657 (2000). Albeit, the Sims Court rejected the parade of "horribles that could happen if a mishap occurs during the execution. . . " Sims, 754 So.2d at 668, Hill claimed "recent" empirical evidence of the "infliction of cruel and unusual punishment" of execution by lethal injection based on research letters by Dr. Davis A. Lubarsky, published in the April 16, 2005, issue of THE LANCET. Hill argues that "the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed."[12]

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[12] The concluding paragraph of the research letters provides:

"Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of a t least some of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted. Koniaris L.G., Zimmers T.A., Lubarsji D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution. Vol. 365. THE LANCET 1412-14 (April 16, 2005)."

The research letters of Dr. Lubarsky and colleagues, are not new as far as any objections to the use of lethal injection as a method of execution.[13] Sims, 754 So.2d at 668 footnote 19[14] (Emphasis added).

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[13] Unless Hill demonstrated that the latest research letters either are so new as to not be unearthed or are so unique that new light is shed on this issue, the state trial court and the Florida Supreme Court were bound by their earlier rulings--finding execution by lethal injection constitutional. Robinson v. State, 30 Fla.L.Weekly S576, 2005 Fla. LEXIS 1452 (Fla. July 7, 2005)(affirming summary denial of claim that execution by lethal injection is unconstitutional, holding that Supreme Court has repeatedly rejected the claim as being without merit); Elledge v. State, 911 So.2d 57 (Fla. 2005) (affirming summary denial of claim that execution by electrocution or lethal injection is unconstitutional because it constitutes cruel and unusual punishment, noting that Supreme Court has repeatedly rejected the claim as being without merit); Johnson v. State, 904 So.2d 400 (Fla. 2005)(holding claim that execution by lethal injection constitutes cruel and unusual punishment in violation of both the Florida and United States Constitutions is without merit and was properly denied without an evidentiary hearing); Parker v. State, 904 So.2d 370 (Fla. 2005) (upholding summary denial of claim that execution by lethal injection or electrocution is cruel and unusual punishment because the Court has repeatedly held that neither form of execution is cruel and unusual punishment).

[14] n19 Professor Radelet testified that lethal injection is the most commonly "botched" method of execution in the United States, with Virginia and Texas being the two states with the highest number of mishaps. He claims that 5.2 percent of the lethal injections encountered unanticipated problems. He also provided examples of what could go wrong during the lethal injection, citing to specific examples throughout the country. The professor admitted, however, that the documented occurrences in his study came from newspaper accounts of the execution and did not come from first-hand, eyewitness accounts or formal findings following a hearing or investigation into the matter.

Hill has not shown how any of the lower courts have misapplied the law governing his 42 U.S.C. §1983 action. Moreover Hill is not entitled to any stay pursuant to the Eleventh Circuit's

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Dr. Lipman, a neuropharmacologist, provided examples of what could happen if the drugs are not administered properly or if the personnel are not adequately trained to administer the lethal substances. For example, if too low a dose of sodium pentothal is administered, the inmate could feel pain because low dosages of such drug have the opposite effect--it makes the pain more acute. In addition, if the drugs are not injected in the proper order, the inmate could suffer pain because he would not be properly anesthetized. Dr. Lipman further noted that if the drugs are not administered in a timely manner, the sodium pentothal could wear off, causing the inmate to regain consciousness. However, Dr. Lipman admitted that lethal injection is a simple procedure and that if the lethal substances to be used by DOC are administered in the proper dosages and in the proper sequence at the appropriate time, they will "bring about the desired effect." He also admitted that at high dosages of the lethal substances intended be used by the DOC, death would certainly result quickly and without sensation.

opinion holding: "It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it it the functional equivalent of a successive habeas petition and he failed to obtain leave of the court to file it. . . . we DENY appellant's application for a stay pf his execution pending appeal."

CONCLUSION

Hill is entitled to no relief and the petition for writ of certiorari should be denied in all respects and any request for stay denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Email and U.S. Mail to D. Todd Doss, 725 SE Baya Drive, Suite 102, Lake City, Florida 32025, this 24th day of January, 2006.

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(5)

Supreme Court, U.S.
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No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL,

Petitioner,

v.

JAMES R. McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* DRS. KEVIN CONCANNON, DENNIS GEISER AND GLENN PETTIFER SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

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IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL

Petitioner,

-against-

JAMES R. MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ET AL.*

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* DRS. KEVIN CONCANNON, DENNIS GEISER AND GLENN PETTIFER SUPPORTING PETITIONER

INTEREST OF THE *AMICI CURIAE*

Drs. Kevin Concannon, Dennis Geiser and Glenn Pettifer submit this brief of *amici curiae* in support of Petitioner Hill. Consent of Petitioner's counsel and Respondent's counsel has been obtained for the filing of this brief.[1]

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[1] Letters from both counsel consenting to the filing of this brief are being filed herewith. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to the preparation and

Drs. Concannon, Geiser and Pettifer (the "Veterinary *Amici*") are experienced veterinarians, with extensive knowledge regarding veterinary anesthesia. They regularly face issues regarding humane euthanasia of animals and have specific expertise regarding the chemicals used by the State of Florida in lethal injection and the limits and effects of their use in euthanizing animals.

Dr. Kevin Concannon is a veterinarian and a diplomate of the American College of Veterinary Anesthesiologists. During nearly 20 years as a practicing veterinarian, he has taught veterinary anesthesia and served as a supervisor of clinical anesthesia at both the University of California – Davis and North Carolina State University College of Veterinary Medicine. Dr. Concannon also researched the measurement of consciousness in anesthetized laboratory animals, and has worked for the past nine years as an emergency/critical care clinician, anesthesia consultant and hospital administrator at the Veterinary Specialty Hospital of the Carolinas.

Dr. Dennis Geiser is a veterinarian and a diplomate of the American Board of Veterinary Practitioners. He is a professor of veterinary science at the University of Tennessee and the Assistant Dean of Organizational Development and Outreach at the College of Veterinary Medicine at the University of Tennessee. Dr. Geiser teaches equine respiratory disease and large animal anesthesia, conducts clinical work in anesthesiology and pain management and performs research in pain management, balance of anesthesia in animals and local and regional anesthesia.

Dr. Glenn Pettifer is a veterinarian and has a D.V.Sc. in veterinary anesthesiology. He is a diplomate and an

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submission of the brief.

executive board member of the American College of Veterinary Anesthesiologists. He currently practices veterinary anesthesiology at the Veterinary Emergency Clinic in Toronto, Canada. Dr. Pettifer formerly taught veterinary anesthesiology and pain management at Louisiana State University, and was later the Chief of Anesthesia Service there.

Based on their years of experience in the field of veterinary anesthesia and pain management, the Veterinary *Amici* respectfully present the Court with information concerning the methods by which humane euthanasia is achieved in animals, and the difficulties involved in achieving humane euthanasia using the chemicals and procedures involved in Florida's lethal injection protocol.

SUMMARY OF ARGUMENT

HUMANE EUTHANASIA

The primary goal of veterinarians who euthanize animals is to achieve death in the most humane manner possible, avoiding pain and suffering of the patient. The manner in which the combination of drugs are administered to prisoners according to Florida's lethal injection protocol, fails to comport with the minimum standards for the humane euthanization of animals in several respects.

The preferred method for humane euthanasia by veterinarians involves the use of a single drug: an overdose of sodium pentobarbital. Sodium pentobarbital is a stable and long-lasting anesthetic, which places the patient in a deep – surgical plane[2] of – anesthesia, which then progresses to apnea as a result a respiratory depression, and then cardiac

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[2] A surgical plane of anesthesia is defined as a level of anesthesia deep enough to ensure that a surgical patient feels no pain and is unconscious for the duration of the surgical procedure.

arrest. The advantages of such a method are speed of action; minimal or transient pain merely associated with the injection; and cost. 2000 Report of the American Veterinary Medical Association ("AVMA") Panel on Euthanasia, 218 J. Am. Veterinary Med. Ass'n 669, 679-80 (March 1, 2001) (hereinafter, "AVMA Report").

The best available information about Florida's current lethal injection protocol is that it calls for the injection of three active drugs. Two of these substances – pancuronium bromide, and potassium chloride –will cause severe pain and suffering when administered to a patient who is not anesthetized to a **surgical plane** of anesthesia.

Specifically, the inmate first is injected with at least two grams of sodium thiopental, which is an "ultra short-acting barbiturate" intended to anesthetize the inmate. *See Sims v. State*, 754 So.2d 657, 666 n.17 (Fla. 2000). After receiving saline solution to flush the injection apparatus, the inmate is injected with at least fifty milligrams of pancuronium bromide, a neuromuscular blocking agent. The effect of the pancuronium bromide is to paralyze the inmate's voluntary muscles. After again receiving an injection of saline solution, the inmate is finally administered at least one hundred and fifty milliequivalents of potassium chloride, which results in a fatal alteration in impulse generation in the heart, leading to cessation of cardiac activity and directly causing the inmate's death.

When injected into an unanaesthetized – or inadequately anesthetized – patient, potassium chloride causes pain and consequent suffering both upon injection and when death ultimately ensues. For that reason, veterinary standards require that if potassium chloride is used at all, a patient must first reach a surgical plane of anesthesia.

While Florida's lethal injection protocol provides for an initial injection of anesthetic, several factors create a real possibility that the inmate will not receive adequate anesthesia to achieve and maintain the surgical plane of anesthesia a veterinarian would require before using potassium chloride to euthanize an animal. First, the Florida protocol does not allow for the assessment necessary under veterinary standards to determine if a surgical plane of anesthesia has been reached and maintained.

Second, sodium thiopental is an "ultra short-acting barbiturate," which has the potential to wear off if any delays occur during the execution, or if the complete dosage is not properly administered. That does not occur in the euthanasia of animals where the individuals who administer the drugs are specifically trained to do so.

Importantly, Florida's lethal injection protocol does not require that an individual trained in anesthesiology determine that the inmate is, in fact, fully unconscious prior to injecting pancuronium bromide or potassium chloride. Again, in the euthanasia of animals, there is constant contact with the patient to assure the plane of anesthesia achieved and maintained. Unlike standard practice in veterinary medicine, there is no requirement under the Florida lethal injection protocol that the patient be observed for any period of time, or that executioners monitor or perform any tests on the patient. To the contrary, publicly available information regarding lethal injection procedures indicates that there is no observer – much less a trained observer – in close enough proximity to the inmate to determine the plane of anesthesia. In contrast, a veterinarian euthanizing an animal accesses and evaluates a number of physiologic parameters, described more fully herein, to ensure that the animal is anesthetized to an appropriate plane of surgical anesthesia prior to administering a drug that causes the animal's death.

In addition, the use of pancuronium bromide is wholly unnecessary, and not approved for euthanasia in veterinary medicine, alone or simultaneously with an anesthetic. Pancuronium bromide, as a neuromuscular inhibitor, paralyzes the patient, and inhibits the ability of a veterinarian to determine the level of consciousness of the patient. In addition, pancuronium bromide causes suffering in an inadequately anesthetized patient. As a neuromuscular blocker, pancuronium bromide inhibits all of the patient's voluntary muscular functions, including breathing, and ultimately causes the patient to suffocate. If a patient is injected with pancuronium bromide before the patient has reached a surgical plane of anesthesia, the patient will suffer the feeling of suffocation while conscious.

As described more fully below, therefore, Florida's discretionary procedures for lethal injection deviate in several respects from the minimum standards of care used by veterinarians to provide for the humane euthanization of animals. Based on the vast experience of veterinarians with euthanasia and the drugs involved here, the information herein should assist courts in determining whether inmates sentenced to death are subjected to gratuitous pain and suffering during the execution process under Florida's current protocol.

ARGUMENT

I. THE PREFERRED METHOD OF HUMANE EUTHANASIA USED BY VETERINARIANS IS THE USE OF SODIUM PENTOBARBITAL ALONE.

The preferred method of humane euthanasia used by veterinarians – and prescribed by Florida law – is the use of sodium pentobarbital without any additional drugs.

Barbiturates generally depress the central nervous system, with loss of consciousness progressing to anesthesia. With a sufficiently large overdose, deep anesthesia progresses to apnea and then cardiac arrest.

The most desirable barbiturates for humane euthanasia are those that are potent, long-acting, stable in solution and inexpensive. The most prominent barbiturate meeting those criteria is sodium pentobarbital. Use of sodium pentobarbital results in rapid loss of consciousness and minimal or transient pain associated merely with insertion of the needle or injection. AVMA Report at 679-80.

Consistent with that view, Florida law provides:

> Sodium pentobarbital, a sodium pentobarbital derivative, or other agent the Board of Veterinary Medicine may approve by rule shall be the only methods used for euthanasia of dogs and cats by public or private agencies, animal shelters, or other facilities which are operated for the collection and care of stray, neglected, abandoned, or unwanted animals.

Title XLVI Fla. Stat. ch. 828.058(1).

Thus, under Florida law, unless otherwise permitted by rule of the Board of Veterinary Medicine, humane euthanasia of dogs and cats is accomplished by the use of a single drug, sodium pentobarbital.

II. THE PROTOCOL FOR USE OF POTASSIUM CHLORIDE IN FLORIDA EXECUTIONS FAILS TO COMPLY WITH MINIMUM VETERINARY STANDARDS FOR HUMANE EUTHANASIA OF ANIMALS.

The use of potassium chloride under the Florida lethal injection protocol fails to comply with minimum veterinary standards for the humane euthanasia of animals. A potassium chloride solution for intravenous injection contains high concentrations of potassium and chloride ions, which can cause pain and consequent suffering in a patient following intravenous injection. Intravenous injection of potassium chloride to a conscious patient causes severe pain due to the potassium-induced irritation of the inner surfaces of the veins. Specifically, an injection of potassium chloride irritates the inner walls of a patient's veins, which are particularly sensitive to potassium. In animals, rippling of muscle tissue and clonic spasms have been observed following an injection of potassium chloride. AVMA Report at 681. Potassium chloride ultimately results in fatal alterations in impulse generation in the heart, leading to cessation of cardiac activity and death.

Because potassium chloride causes agony to an unanesthetized patient, AVMA standards provide that potassium chloride may only be administered to a patient under a surgical plane of anesthesia and that the anesthesia be administered by someone trained and knowledgeable in anesthetic techniques:

> It is of utmost importance that personnel performing this technique are trained and knowledgeable in anesthetic techniques, and are competent in assessing anesthetic depth appropriate for administration of

> potassium chloride intravenously. Administration of potassium chloride intravenously requires animals to be in a surgical plane of anesthesia characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli.

AVMA Report at 680-81.

Use of potassium chloride on a conscious patient is "unacceptable and absolutely condemned." AVMA Report at 681. An execution conforming to veterinary standards, therefore, must provide that an inmate is administered a sufficient quantity of anesthetic to remain unconscious at a surgical plane of anesthesia through the potassium chloride injection, and for the duration of the execution.

A. Sodium Thiopental's Short-Acting Nature Precludes Or Limits Its Use In Veterinary Euthanasia.

Sodium thiopental is considered an "ultra short acting" barbiturate anesthetic. *Sims*, 754 So.2d at 666, n. 17. In contrast, most veterinary euthanasias are performed using sodium pentobarbital (a stable and longer acting anesthetic), which is used both to induce anesthesia and to cause death. Indeed, the AVMA standards for euthanasia indicate that the ideal barbituric acid derivative for use in euthanasia should be potent, long acting, stable and inexpensive. AVMA Report at 680. Sodium pentobarbital – not sodium thiopental – best fits that description. *Id.* Consistent with that mandate, absent separate approval by the state Board of Veterinary Medicine, Florida's animal euthanasia statute only allows for the use of sodium pentobarbital or a sodium pentobarbital derivative for euthanasia of dogs and cats. Title XLVI Fla. Stat. ch. 828.058(1).

As observed with veterinary patients, sodium

pentobarbital rapidly produces unconsciousness and then continues to depress the areas of the brain responsible for respiratory and cardiovascular control. With one injection, the patient rapidly progresses from a light to deep level of anesthesia and ultimately dies.

If a short acting anesthetic, such as sodium thiopental, were to be used for euthanasia of animals simply to induce anesthesia (as it is used in lethal injections), the veterinarian would need to assess the depth of anesthesia and loss of consciousness prior to administering any other drugs (such as potassium chloride) for the purpose of producing death. Importantly, consciousness must be assessed by a veterinarian after the anesthetic is injected and **prior to** injection of any other drug. A veterinarian would not make assumptions about consciousness without relying on a direct assessment of the patient and the patient's vital signs.

B. Florida's Lethal Injection Protocol Would Not Allow a Veterinarian to Adequately Ensure That a Patient Was Unconscious to a Surgical Plane of Anesthesia.

Examination of publicly available information regarding Florida's lethal injection procedures shows that no steps are taken to ensure that a surgical plane of anesthesia – a prerequisite for administration of potassium chloride under veterinary standards – is achieved and maintained. *See, e.g., Sims*, 754 So. 2d at 666 n.17. A surgical plane of anesthesia is described as "loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli." AVMA Report at 681. Use of potassium chloride on an animal that is not in such a state is "unacceptable and absolutely condemned" by the AVMA. *Id.*

In veterinary science, evaluating whether a patient has achieved an appropriate plane of anesthesia is both a science

and an art. It is extremely difficult for an untrained individual to appropriately assess a patient's level of unconsciousness, and veterinarians rely on skill and experience to do so. The observer must perform a variety of tests and have the ability to look for and perceive sometimes subtle clues from the patient.

Typically, a veterinarian (or trained assistant) maintains constant contact with a patient throughout the process of administering anesthesia. In determining whether the patient is sufficiently anesthetized, a veterinarian assesses the level of consciousness by direct evaluation of the patient's physiologic parameters (vital signs). A veterinarian evaluates the patient's muscle tone and the level of the patient's muscle relaxation. A veterinarian should also locate the patient's pupils in orbit, and look for the presence or absence of any eye movement. The patient's respiratory and heart rate must be monitored. The veterinarian also tests the patient's reaction to stimuli by applying mildly painful stimuli and observing any movement by the patient. Veterinarians touch the patient to help assess these variables, as well as relying on monitors for data such as blood pressure and heart rate.

Such steps are necessary to ensure that the patient has reached the desired surgical plane of anesthesia, and require an experienced veterinarian to touch and observe the patient at close proximity. The process of examining the patient takes several minutes, as a variety of factors must be considered.

In contrast, information available regarding Florida's lethal injection protocol indicates that no provision is made for any such examination of an inmate during the anesthetization process, much less by a physician or medical professional experienced in administering anesthesia. There is no indication that any person remains in sufficiently close

proximity to the inmate to perform any of the above-described tests. Evidence regarding similar lethal injection procedures in other states expressly indicates that observers and individuals performing the lethal injection typically remain in a separate room, where they cannot even see the inmate during the execution. Such complete disregard for the effectiveness of the anesthetic prior to injecting an inmate with potassium chloride falls far short of the minimum standards and applicable veterinary precautions for the humane euthanasia of animals.

Furthermore, anecdotal evidence regarding executions performed using the three-drug combination of sodium thiopental, pancuronium bromide and potassium chloride nearly identical to Florida's lethal injection procedure shows that in several cases, inmates seemed to retain consciousness throughout the execution. *See, e.g., Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005)(several California inmates seemed to remain conscious despite the purported injection of five grams of sodium thiopental, as opposed to the two grams called for in Florida's lethal injection protocol). The internal survey performed by the Florida Corrections Commission prior to implementing the current lethal injection protocol expressly acknowledged that some recipients of the three-drug combination underwent a "violent reaction to lethal drugs," raising grave concerns that the inmates were not, in fact, fully anesthetized prior to receiving either pancuronium bromide or the potassium chloride injections. Florida Corrections Commission, Supplemental Report – Methods of Execution Used by States (1997) (hereinafter, "FCC Report") at 10 (available at http://www.fcc.state.fl.us/fcc/reports/reports.html).

Finally, proper veterinary procedure demands that a veterinarian administering euthanasia solution to a patient ensure that all of the euthanasia solution was delivered to the patient's vein. Sodium thiopental must be properly

administered intravenously, which can be extremely difficult—indeed, impossible – for an untrained individual. If the anesthetic is not properly mixed and injected directly into the patient's vein, the medication will leak into surrounding tissue, and lessen the effectiveness of the intended dosage.

The FCC Report notes that "difficulty locating a viable vein to establish the intravenous connection" is a common problem in lethal injections. FCC Report at 10. Other cited problems include the tightness of the leather straps around the inmate, which may lead to problems in circulation of the lethal injection drugs, and clogging of the tubes carrying the drugs because of the mixture of two or more of the solutions, and necessitating the replacement of the tubes during the execution. *Id.* Finally, evidence obtained in autopsies performed on inmates executed pursuant to Florida's lethal injection statute is inconsistent with effective delivery of all drugs to the inmates. At least three inmates (of 16 executed by lethal injection in Florida) suffered through lengthy executions marked by errors in obtaining correct insertion to a vein, and several puncture wounds on the inmates.

Given the myriad of potential problems created by the complex lethal injection procedure, the administration of drugs by inexperienced personnel with inadequate training only increases the risk that the sodium thiopental anesthetic will not be properly delivered to the inmate, and that the execution will not proceed under humane conditions, as the inmate will remain inadequately anesthetized or even conscious during the administration of potassium chloride. Without providing for careful monitoring of an inmate's level of consciousness, Florida's lethal injection protocol falls far short of the precautions required in humane veterinary euthanasia.

III. THE USE OF NEUROMUSCULAR BLOCKERS IN THE FLORIDA LETHAL INJECTION PROTOCOL IS CONTRARY TO HUMANE VETERINARY EUTHANASIA AND MASKS CONSCIOUSNESS.

The use of neuromuscular blockers in the Florida lethal injection protocol is unnecessary, contrary to humane veterinary euthanasia and adds risk to the procedure because the drug masks consciousness. Pancuronium bromide is a neuromuscular agent that completely paralyzes a patient's voluntary muscles. Veterinarians do not typically use pancuronium bromide or any other neuromuscular blocking agent when euthanizing animals and the AVMA has severely limited its use.

Pancuronium bromide masks indicia of pain or consciousness in the patient during the euthanization process, and causes a conscious patient to suffer by experiencing suffocation.

A. Pancuronium Bromide Inhibits The Ability To Assess The Patient's Consciousness.

The muscle paralysis caused by pancuronium bromide masks indicia of consciousness, making it even more difficult for observers to ascertain whether the patient is properly anesthetized. As described above, determining whether a patient has achieved a surgical plane of anesthesia involves careful observation, including observation of the patient's muscle movements and response to stimuli. Paralyzing the patient makes it far more difficult for a veterinarian to effectively determine the patient's level of consciousness.

Pancuronium bromide does not contribute to anesthesia or unconsciousness. It is not an anesthetic, pain killer or an analgesic. The use of pancuronium bromide

could create the impression that a patient is unconscious, calm or serene when the patient is actually in extreme pain or suffering.

B. Pancuronium Bromide Causes A Conscious Patient To Experience Suffocation.

Use of pancuronium bromide following the administration of a short-acting anesthetic such as sodium thiopental increases the probability that the patient will endure pain or mental distress prior to death. Specifically, if the pancuronium bromide takes effect before the patient reaches a surgical plane of anesthesia as a result of sodium thiopental, a veterinary patient would be aware of the need to breathe, the inability to do so and the terrifying experience of suffocation.

As a result, Florida's euthanasia statute provides that "any substance which acts as a neuromuscular blocking agent . . . **may not be used** on a dog or cat for any purpose," except where "an emergency situation exists which requires the immediate euthanasia of an injured, diseased, or dangerous animal." Title XLVI Fla. Stat. Fla. Stat. 828.058(3).[3]

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[3] Florida is one of 30 states that prohibit the use of neuromuscular blocking agents in euthanizing animals, either expressly and/or by specifically mandating the use of a method such as sodium pentobarbital. Ala. Code 34-29-131; Alaska Stat. 08.02.050; Ariz. Rev. Stat. Ann. 11-1021; Cal. Bus. & Prof. Code 4827; Colo. Rev. Stat. 18-9-201; Conn. Gen. Stat. 22-344a; Del. Code Ann. tit. 3, § 8001; Ga. Code Ann. 4-11-5.1; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. 47-1718(a); La. Rev. Stat. Ann. 3:2465; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; Mich. Comp. laws 333.7333; Mo. Rev. Stat. 578.005(7); Neb. Rev. Stat. 54-2503; Nev. Rev. Stat. Ann. 638.005; N.J. Stat. Ann. 4:22-19.3; N.Y. Agric. & Mkts. Law 374; Ohio Rev. Code Ann. 4729.532; Okla. Stat. tit. 4, § 501; Ore. Rev. Stat. 686.040(6); R.I. Gen. Laws 4-1-34; S.C. Code Ann. 47-3-420; Tenn. Code Ann. 44-17-303; Tex. Health & Safety Code Ann. 821.052(a); W. Va. Code 30-10A-8; Wyo. Stat. Ann. 33-30-216.

In a veterinary context, pancuronium bromide is wholly superfluous to the goal of humane euthanization. Its only effect is to mask any suffering endured by the patient and to interfere with an assessment of consciousness. Its use as contemplated by the Florida lethal injection protocol is contrary to veterinary standards and humane euthanasia of animals.

CONCLUSION

For all the foregoing reasons, the Veterinary *Amici* respectfully submit that the protocol for execution by lethal injection, as presently articulated by the State of Florida, fails to comport with veterinary standards for humane euthanasia.

March 3, 2006

Respectfully submitted,

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In The

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner,

v.

JAMES R. MCDONOUGH, Interim Secretary, Florida Department of Corrections, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF HUMAN RIGHTS ADVOCATES, HUMAN RIGHTS WATCH, AND MINNESOTA ADVOCATES FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Human Rights Advocates, Human Rights Watch, and Minnesota Advocates for Human Rights hereby request that the Court consider this brief pursuant to Rule 37.2(a) in support of Petitioner Hill. Consent of Petitioner's Counsel of Record and the State District Attorney's Office has been obtained.[1]

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Human Rights Advocates has a Special Consultative Status at the United Nations. Human Rights Advocates has submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue.[2]

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It also

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[1] Letters from both counsel consenting to the filing of this brief are being sent with this brief to the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, their members or their counsel made a monetary contribution to the preparation and submission of the brief.

[2] Examples of *amicus* briefs filed by Human Rights Advocates include those in the following cases: *Roper v. Simmons*, 543 U.S. 551 (2005); *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Butt v. State*, 842 P.2d 1240, 4 Cal. 4th 668 (1992).

has Special Consultative Status at the United Nations. It regularly reports on human rights conditions in more than seventy countries around the world, and it actively promotes legislation and policies worldwide that advance protections in the area of domestic and international human rights and humanitarian law.

Minnesota Advocates for Human Rights ("Minnesota Advocates"), founded in 1983, is a volunteer-based non-profit organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than fifty reports documenting human rights practices in more than twenty-five countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates' Death Penalty Project was organized in 1991 to recruit Minnesota attorneys to assist death row inmates with their post-conviction appeals. Minnesota Advocates previously has submitted *amicus curiae* briefs in numerous cases, including to the Inter-American Court of Human Rights.

Amici would like to take the opportunity to advise this Court of the pertinent international standards that may provide assistance in interpreting the United States constitutional provisions involved in this case. Specifically, *amici* would like to address issues raised by Petitioner regarding the use of the use of the lethal injection protocol currently employed by Florida Department of Corrections.

The applicable international standards include: 1) two international treaties ratified by the United States, and 2) the interpretation of relevant clauses of one of the treaties by the body specifically charged with enforcing the treaty.

While international law does not prohibit the death penalty, it does limit methods that may be used. The treaty law in this area requires that the death penalty be applied in such a manner as to cause the least possible physical and mental suffering. The parties have failed to address that requirement. Because the Court may find this new information helpful, *amici* request that the Court consider it.

STATEMENT OF FACTS

In a complaint brought under 42 U.S.C. § 1983 and filed in the United States District Court for the Northern District of Florida, petitioner Clarence Hill alleged that the defendants, acting under color of state law, are using a protocol for carrying out executions by lethal injection that creates a foreseeable and unnecessary risk of inflicting pain. This Court granted *certiorari* in order to determine whether such a claim is properly brought under 42 U.S.C. § 1983, or in a petition for writ of habeas corpus. *Amici* urge the Court to consider the international treaty obligations in determining the appropriateness of raising this claim under Section 1983.

Florida's procedures for lethal injection are not prescribed by statute but are left to the discretion of the Department of Corrections. At the present time, they appear to be the same as when they were described in *Sims v. State*, 754 So. 2d 657, 665 n.17 (2000):

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Virtually all U.S. jurisdictions that perform executions by lethal injection appear to use a similar three-chemical protocol. Recently, problems with California's cognate protocol were found in *Morales v. Hickman*, __ F. Supp.2d __, 2006 WL 335427 (N.D. Cal. Feb. 14, 2006), where the district court noted than in six out of thirteen California executions by lethal injection, the State's own execution logs "raise[d] at least some doubt as to whether the protocol actually is functioning as intended," *id.* at *6, and particularly observed that four of the logs "contain indications that there may have been problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions," *id.* at 4 (quoting *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005)).

The trauma experienced by a person who regains or retains consciousness, who cannot communicate that fact because he has received a paralytic agent, and who is then

subjected to a painful procedure is almost unimaginable, as shown by the experience of Carol Weihrer:

> According to Weihrer's affidavit, she underwent eye surgery. The sedative she received was ineffectual and left her conscious during the entire surgery. Because of the administration of a neuromuscular blocking agent like pancuronium bromide, however, she was unable to indicate her consciousness and horrific pain to the doctor removing her eyeball for surgical repair: "I therefore experienced what has come to be known as Anesthesia Awareness, in which I was able to think lucidly, hear, perceive, and feel everything that was going on during the surgery, but I was unable to move. It burnt like the fires of hell. It was the most terrifying, torturous experience you can imagine. The experience was worse than death."

Press Release, Office of the Ohio Public Defender, Ohio's Execution Procedure's Not Fit for a Dog, http://opd.ohio.gov/press/pr_12_31-03.htm (Dec. 31, 2003) (quoting Affidavit of Carol Weihrer and describing Section 1983 complaint and attachments filed that day by condemned inmates Lewis Williams Jr. and John Glenn Roe).

In the instant case, the district court did not address the substance of Clarence Hill's Section 1983 complaint, and instead dismissed the action on jurisdictional grounds. The Eleventh Circuit affirmed that decision.

ARGUMENT

UNITED STATES TREATY OBLIGATIONS SUPPORT PETITIONER'S CONTENTION THAT THE CURRENT PROTOCOL FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT

The International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter Covenant], is a United Nations treaty ratified by the United States in 1992. S. Res. 4783, 102d Cong., 2d Sess., 138 CONG. REC. S4781-84 (1992) (enacted). As of February 27, 2006, there were 155 parties to the Covenant. United Nations Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp (last visited February 27, 2006). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture], is also a treaty ratified by the United States in 1994. S. Res. 17491-2, 101st Cong., 2d Sess., 136 CONG. REC. S. 17486-01 (1990) (enacted). As of February 27, 2006, there were 141 parties to the Convention. United Nations Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp (last visited February 27, 2006).

Under Article VI of the United States Constitution, a ratified treaty is part of the supreme law of the land. Ratification is not to be treated lightly, and such action by the President and the Senate evidences the acceptance of the language of the Covenant, except to the extent that

reservations are specified. The document should, therefore, provide meaningful guidance to the Court.[3]

Article 7 of the Covenant provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Covenant, *supra*, at art. 7. Article 4(2) of the Covenant indicates that Article 7 is at no times derogable. *Id.* at art. 4(2). In addition to the prohibition against torture, the Convention Against Torture, *supra*, in Article 16, § 1 provides:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Human Rights Committee is the body which officially monitors compliance with the Covenant. In its

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[3] The Senate consent to the Covenant was accompanied by a declaration "that the provisions of Articles 1 through 27 are not self-executing." S. Res. 4783, 102d Cong., 2d Sess. (1992). The legislative history shows that those words were intended to prohibit only a private and independent cause of action. The declaration does not preclude courts from using the treaty as a guide in elucidating constitutional guarantees. The United States government's position is that "courts could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, United States Department of State, to the United Nations Human Rights Committee, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995). Further, the declaration does not affect the obligations of the United States under the Covenant. *See*, David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: the Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

comments concerning Article 7 the Committee stated that "when the death penalty is applied by a State party for the most serious crimes, . . . it must be carried out in such a way as to cause the least possible physical and mental suffering." CCPR Gen. Comment 20, U.N. Hum. Rts. Committee, 44th Sess., at ¶ 6, U.N. Doc. CCPR/C/21/Add. 3 (1992). The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII. Because the United States now has ratified the Covenant, the development of Article 7 should help courts construe the scope of the Eighth Amendment's final clause. The Covenant has become a part of United States law and thus surely is relevant to the meaning of the Eighth Amendment.[4]

The allegations in this case indicate that carrying out an execution using the current protocol for lethal injection does violate Article 7, as plainly written and officially construed. The use of this protocol does not reliably "cause the least possible physical and mental suffering."[5]

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[4] International human rights standards have often been useful tools for interpreting United States laws. *See generally,* Connie de la Vega, *Protecting Economic, Social and Cultural Rights,* 15 WHITTIER L.REV. 471, 476-77 (1994); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 U. CIN. L. REV. 3 (1993). *See also,* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 1 RUTGERS RACE & L.REV. 193 (1999); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective,* 14 MICH. J. INT'L L. 1 (1993).

[5] The United States reservation to the Covenant that cruel, inhuman, or degrading treatment or punishment means the cruel and unusual punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments, S. Res. 4783, 102d Cong., 2d Sess. (1992), by no means precludes Article 7's application to this case. Article 7 is not inconsistent with the Eighth Amendment regarding the facts of this case. The

(Continued on following page)

The Human Rights Committee was given the opportunity to again construe Article 7 in the case of Charles Chitat Ng. U.N. Hum. Rts. Committee, 49th Sess., U.N. Doc. CCPR/C/49/D/469 (1991). After fleeing to Canada, Ng was returned to the United States under the extradition treaty between the two nations. He submitted to the Human Rights Committee a communication claiming that the extradition to California exposed him to probable execution by gas asphyxiation which violated his rights under the Covenant. Under the extradition treaty, Canada could have sought assurance that he would not be punished with death, but did not.

The Human Rights Committee concluded that Canada violated Article 7 when it refused to seek such assurance since it could reasonably have foreseen that Ng, if sentenced to death, would be executed by means of lethal gas. The Committee specifically held that "execution by gas asphyxiation, should the death penalty be imposed on [Ng], would not meet the test of 'least possible physical and mental suffering,' and constitutes cruel and inhuman treatment . . . " and Canada thus violated Article 7 of the Covenant. *Id.* at 21. The Committee based its findings on evidence submitted by Ng regarding the length of consciousness after asphyxiation begins. Ng also referenced the execution record of Robert Harris, noting that death by asphyxiation can take up to twelve minutes, during which time "condemned persons remain conscious, experience

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language of the Eighth Amendment is broad enough to forbid the use of this particular protocol for lethal injection as a means of execution, and United States courts should not ignore international pronouncements on treaties to which it is party.

obvious pain and agony, drool and convulse and often soil themselves." *Id.* at 14.

There is evidence that protocols similar to that used in Florida have resulted in unnecessary suffering and potentially excruciating pain and thus in executions that violate the prohibitions of Article 7 and of the Cruel and Unusual Punishments Clause of the Eighth Amendment. As the District Court in *Morales* found, the evidence of its use in California raises "at least some doubt as to whether [it] actually is functioning as intended." *Morales*, 2006 WL 335427, at *6. Petitioner should not be subjected to death by use of that protocol until there is a judicial assessment of the potential for extreme pain that has been involved in its past use and a determination of whether it will be "carried it out in such a way as to cause the least possible and physical and mental suffering." CCPR Gen. Comment 20, *supra*.

Other courts have examined particular methods of execution and found them constitutionally wanting. A court in California made the following factual findings with respect to death by lethal gas:

> [I]nmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas. . . . [A]n inmate probably remains conscious anywhere from 15 seconds to one minute, and . . . there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time . . . inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects to

> the cyanide gas include tetany, an exquisitely painful concentration of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain.

Fierro v. Gomez, 865 F. Supp. 1387, 1404 (N.D. Cal. 1994) (citations omitted). Even though the district court's decision in *Fierro* has been vacated, the Ninth Circuit has upheld the findings of extreme pain and has concluded that the use of execution by lethal gas is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments. *See, LaGrand v. Stewart*, 173 F.3d 1144, 1149 (9th Cir. 1999). That decision is in conformity with the Human Rights Committee decision in the Ng case.

At this point in Florida, persons on death row not only face the possibility of being subjected to extreme pain, but in addition must suffer the anxiety that they may. *Amici* ask the Court to consider the significant parallel between the cases and the treaty standards that apply when reviewing this case.

CONCLUSION

The imposition of the death penalty using the current protocol for lethal injection potentially violates the International Covenant on Civil and Political Rights and the Convention Against Torture. Because the United States is a party to both treaties, the Eighth Amendment should be construed so as not to conflict with it. Hence, the case should be remanded to the lower courts so that there can

be a proper trial on the protocol for lethal injection and a determination can be made on the merits on whether it does cause the least amount of suffering.

Date: March 3, 2006

Respectfully submitted,

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(9)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254.

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit.

The petitioner here and plaintiff-appellant below is Clarence Edward Hill.

Defendants-appellees below were James V. Crosby, Jr., in his official capacity as Secretary of the Florida Department of Corrections, and Charlie Crist, in his official capacity as Attorney General of Florida. James V. Crosby, Jr. has since been replaced on an interim basis by James R. McDonough. McDonough has been substituted as a party pursuant to Supreme Court Rule 35.3.

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The opinion of the U.S. Court of Appeals for the Eleventh Circuit is available at 2006 WL 163607 and is reprinted in the Joint Appendix ("J.A.") at 9-10. The district court opinion is available at 2006 WL 167585 and is reprinted at J.A. 11-15.

JURISDICTION

The court of appeals entered its judgment on January 24, 2006. The petition for a writ of certiorari was timely filed on January 24, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . .

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Introduction

This case presents the question whether there is any federal forum for a condemned inmate who contends that a state corrections department's discretionary choice of an excruciatingly and unnecessarily torturous method for carrying out a lethal injection violates the Eighth and Fourteenth Amendments. The Eleventh Circuit below (and in cases preceding and following this one) has wholly foreclosed access to the federal courts for inmates who, while not challenging the State's right to execute them – or even the State's right to execute them by a humane lethal injection procedure – seek a hearing on the claim that the procedure actually chosen by state officials is wantonly and needlessly cruel.

The case of Petitioner Clarence Hill provides a vivid illustration. Mr. Hill contends that the particular lethal injection procedures Florida intends to use to execute him violate the Eighth Amendment because those procedures create a foreseeable probability that he will be subjected to excruciating pain before death. He sought to raise that claim – following the conclusion of all judicial proceedings challenging his conviction and sentence – by filing a federal civil rights action under 42 U.S.C. § 1983 modeled on the one this Court approved in *Nelson v. Campbell*, 541 U.S. 637 (2004). But the Eleventh Circuit recharacterized this action as a habeas corpus petition and then proceeded to hold that, because of Mr. Hill's earlier federal habeas petition challenging his conviction and sentence, his present action was an improper "second or successive [habeas] petition" – even though his only present claim challenges the discretionary choice of a particular lethal injection procedure by the Florida Department of Corrections. J.A. 9-10. As a result, Mr. Hill has been denied any federal forum for his Eighth Amendment claim.

As Mr. Hill will show, that result is impossible to square with this Court's decisions. In *Nelson*, a unanimous Court held that a condemned prisoner may use § 1983 to challenge a particular lethal injection procedure as long as the relief sought would not "*necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647 (emphasis in original). Mr. Hill's § 1983 challenge here falls squarely within the ambit of *Nelson*. Should he prevail, the State would remain free to carry out his execution by a lethal injection using other more humane (and constitutional) lethal injection procedures.

In all events, even if Mr. Hill's suit were recharacterized as a habeas petition, the Eleventh Circuit erred in deeming it the functional equivalent of a "second or successive" petition. In this case, Mr. Hill's claim was not ripe for presentation or judicial consideration until after his earlier federal habeas case was final and the Department of Corrections' execution process began – indeed, Florida did not even adopt lethal injection as the presumptive method of execution until after the denial of Mr. Hill's first federal habeas was final. Under this Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), a state prisoner does not present a successive petition when the petition raises a claim that would not have been ripe at the time of the first petition.

It follows *a fortiori* from these decisions that Mr. Hill's claim is not subject to dismissal. Because *Nelson* directly authorizes the bringing of Mr. Hill's claim in a § 1983 case, and because the claim would not have been subject to dismissal under § 2244(b) even if brought in a habeas case (and therefore is not fairly characterized as an end-run around the limitations on habeas jurisdiction), there is no conceivable basis for concluding that the district court lacked subject matter jurisdiction to adjudicate the claim.

B. Factual Background

Mr. Hill was convicted of murder and sentenced to death in 1983. His death sentence was twice vacated in state and federal postconviction proceedings.[1] The Florida Supreme Court reimposed the death sentence in 1995. *Hill v. State*, 643 So. 2d 1071 (Fla. 1995). Mr. Hill then sought federal habeas corpus relief from the reimposed sentence. The district court denied relief, and the Eleventh Circuit affirmed. *Hill v. Moore*, 175 F.3d 915 (11th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000).

In January 2000, after Mr. Hill's first federal habeas corpus proceeding was final, Florida amended its laws to make lethal injection the presumptive method of execution in the State. Fla. Stat. § 922.105 provides that "[a] death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution."[2]

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[1] In 1985, the Florida Supreme Court invalidated the death sentence, *Hill v. State*, 477 So. 2d 553 (Fla. 1985), and Mr. Hill again received the death sentence in a resentencing proceeding in 1986. The Florida Supreme Court affirmed that sentence. *Hill v. State*, 515 So. 2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1988). After an initial warrant for execution was signed in November 1989, Mr. Hill sought postconviction relief in state court and then in federal court. In January 1990, the federal district court granted a stay of execution. In 1992, the court granted Mr. Hill's petition on the ground that the state trial court and the Florida Supreme Court failed to conduct a proper harmless error inquiry when re-weighing the aggravating factors supporting a death sentence after one of the factors found by the trier of fact had been invalidated. After that ruling, the Florida Supreme Court reweighed the aggravating and mitigating factors, and again sentenced Mr. Hill to death. *Hill v. State*, 643 So. 2d 1071 (Fla. 1995).

[2] Prior to January 2000, Florida law provided that "[a] death sentence shall be executed by electrocution." Fla. Stat. § 922.105 (1999). The earlier statute provided that, in the event electrocution was held

The Florida legislature did not prescribe by statute the precise method to be used in carrying out lethal injections. That authority was left to the discretion of the Florida Department of Corrections. *See Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (noting that the Florida legislature did not specify the procedures for lethal injection but left this determination up to the Department of Corrections "because it has personnel better qualified to make such determinations"). The Department of Corrections has not promulgated any regulation or published any guidance prescribing the lethal injection procedures it uses to execute condemned prisoners. It therefore retains complete discretion to design procedures for lethal injections and to modify those procedures at any time for any reason. The Department could do so based on advances in scientific understanding, knowledge gained through the experience of prior lethal injections in Florida or elsewhere, or even through negotiations with the condemned prisoner to avoid unnecessary risks of pain or suffering. *Cf. Nelson*, 541 U.S. at 640-41 (describing the negotiations between the condemned inmate and prison officials about the protocols for his lethal injection).

Because the Department of Corrections does not publish any information about its lethal injection methods and is free to change methods at any time, it is impossible to know in advance what procedures the Department will use to execute Mr. Hill. Mr. Hill sought to obtain that information from the Department, but his request was refused. Compl. ¶ 15 n.3, J.A. 21.

The only readily available source of information about Florida's practices for administering lethal injections is the record of the *Sims* case, in which the Secretary of Corrections and other witnesses described the procedure by which Florida

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unconstitutional, "all persons sentenced to death for a capital crime shall be executed by lethal injection." *Id.*

planned to carry out lethal injections in 2000, when lethal injection had only just been adopted. 754 So. 2d at 665 n.17. That procedure involved the use of a three-chemical sequence.

The procedure described in *Sims* began with the administration of two grams of sodium pentothal, the only anesthetic used in the process. Sodium pentothal is a short-acting substance that produces a shallow level of anesthesia. Health care professionals use it only as an initial anesthetic in preparation for surgery while they set up a patient's breathing tube and administer different drugs to bring the patient to a surgical plane of anesthesia that will last through the operation and block the stimuli of surgery that would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the deep anesthesia, so that the patient can wake up and signal to the staff that something is wrong. Compl. ¶ 9, J.A. 18-19.

The second step of the procedure described in *Sims* was the administration of fifty milligrams of pancuronium bromide, a paralytic agent that stops one's breathing. That chemical has three effects relevant here. First, it causes the condemned prisoner to whom it is administered to suffer suffocation when the lungs are paralyzed. Second, it blocks the condemned prisoner from manifesting any suffering he or she might be experiencing because it prevents any movement, speech, or facial expressions. Compl. ¶ 10, J.A. 19. Third, if pancuronium bromide is administered improperly and comes into contact with sodium pentothal, the sodium pentothal will precipitate and become ineffective. *See, e.g., Brown v. Crawford*, 408 F.3d 1027, 1028 (8th Cir. 2005) (Bye, J., dissenting), *cert. denied*, 125 S. Ct. 2927 (2005).

The procedure described in *Sims* concluded with the administration of 150 milliequivalents of potassium chloride,

which inflicts death by causing cardiac arrest. Potassium chloride burns intensely as it courses through the veins to the heart. It also causes massive muscle cramping before cardiac arrest. Compl. ¶ 12, J.A. 19.

The practices outlined in *Sims* included no requirement that persons knowledgeable about, or trained in the administration of, these chemicals carry out the lethal injection. *See Sims*, 754 So. 2d at 665 n.17. Although a physician apparently stands behind the executioner and a physician's assistant observes the execution and certifies death, *id.* at 666 n.17, there is no indication that either attendee has the ability to monitor the inmate's anesthetic depth from the inmate's side (or even from the same room); that the observers are appropriately trained to detect inadequate anesthetic depth; that the executioner has been given appropriate training, including careful instructions on how to number and operate the syringes to avoid misadministration of the chemicals; or that the IV tubes running from the syringe to the inmate's body are properly designed and attached so that the chemicals do not leak. It also does not indicate the duration between injections or how and where the inmate's veins will be accessed.[3] In short, there is no indication that the procedures used by the Department of Corrections (as described in *Sims*) contain adequate safeguards to ensure that the chemicals and methods of administration do not cause unnecessary or wanton pain.

This is especially troubling given that the chemicals the Department of Corrections has selected are themselves volatile and likely to give rise to wanton pain in many

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[3] A "cut-down" procedure would, for instance, raise serious constitutional concerns. *See, e.g., Nelson*, 541 U.S. at 642. Additionally, at least one court has already ruled unconstitutional lethal injection into the jugular vein of the neck of the condemned prisoner. *See Baze v. Rees*, No. 04-CI-01094, slip op. at 13 (Ky. Cir. Ct. July 8, 2005).

circumstances. If sodium pentothal fails to perform its anesthetic function (because it has been administered improperly or in an incorrect dosage[4]), the condemned prisoner will endure intense suffering (from conscious suffocation) and excruciating pain (from the effects of potassium chloride in the veins and on the muscles). Moreover, because of the paralyzing effects of pancuronium bromide, the person being executed will lack the ability to convey suffering to those supervising the execution.

Florida's procedure is similar to procedures that two district courts have recently found to raise serious questions under the Eighth Amendment. *See Morales v. Hickman*, __ F. Supp. 2d __, 2006 WL 335427, at *7 (N.D. Cal. Feb. 14, 2006) (finding that administration of same three-chemical sequence raises "substantial questions" that the condemned would be subjected to "an undue risk of extreme pain"), *aff'd*, __ F.3d __, 2006 WL 391604 (9th Cir. Feb. 19, 2006), *cert. denied*, No. 05-9291, __ S. Ct. __, 2006 WL 386765 (Feb. 20, 2006); *Anderson v. Evans*, No. Civ-05-0825-F, 2006 WL 83093, at *4 (W.D. Okla. Jan. 11, 2006) (accepting in its entirety a Magistrate Judge's report holding that death-sentenced inmates stated a valid claim that Oklahoma's administration of same three-chemical sequence for lethal injection "creates an excessive risk of substantial injury" and pain under the Eighth Amendment).

C. Proceedings Below

On November 29, 2005, the Governor of Florida signed an execution warrant that set Mr. Hill's execution for January 24, 2006. Hill promptly sought from the Department of

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[4] It is noteworthy that Florida uses only two grams of sodium pentothal, less than half of the five grams used by States such as California. *See Morales v. Hickman*, No. C06-219, __ F.Supp.2d __, 2006 WL 335427, at *1 (N.D. Cal. Feb. 14, 2006), *aff'd*, No. 06-99022, __ F.3d __, 2006 WL 391604 (9th Cir. Feb. 16, 2006), *cert. denied*, No. 05-9291, __ S. Ct. __, 2006 WL 386765 (Feb. 20, 2006).

Corrections information relevant to the method the Department proposed to use to execute him, including principally "a complete copy of the execution procedures, protocols, policies and guidelines utilized during executions by lethal injection in Florida," and information on "the drugs administered during lethal injection in Florida, the dose of the drugs, and the order as to which the drugs are administered." Defendant's Demand for Additional Public Records at 2 (Dec. 8, 2005). The Department refused to provide any information in response. Compl. ¶ 15 n.3, J.A. 21.

Following the Department's refusal to comply with his December 8, 2005 demands, Mr. Hill filed a state postconviction petition on December 15, 2005, raising an Eighth Amendment challenge to the particular procedures the Department intended to use to execute him and seeking an evidentiary hearing to marshal evidence regarding the risks of wanton pain and suffering inherent in the procedures the Department has chosen. The Circuit Court for Escambia County denied Mr. Hill's request for an evidentiary hearing and dismissed his Eighth Amendment claim as procedurally barred on December 23, 2005. On January 3, 2006, Mr. Hill appealed to the Florida Supreme Court, which affirmed the state trial court's decision on January 17, 2006. *Hill v. State*, No. SC06-2, __ So. 2d __, 2006 WL 91302 (Fla. Jan. 17, 2006), *cert. denied*, No. 05-8731, 2006 WL 160276 (Feb. 27, 2006).

On January 20, 2006, Hill filed a complaint in the United States District Court for the Middle District of Florida pursuant to 42 U.S.C. § 1983. The complaint asserted that the particular procedures the Department of Corrections intended to use to execute him "will cause unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment."

Compl. ¶ 18, J.A. 21. The complaint sought a preliminary injunction prohibiting Mr. Hill's execution until his Eighth Amendment claim could be adjudicated, and a "permanent injunction[] barring defendants from executing Plaintiff *in the manner they currently intend.*" Compl. ¶ 20, J.A. 22 (emphasis added). The complaint neither alleged nor implied that the State lacked the authority to execute Mr. Hill by a different and lawful method, including by a different lawful method of lethal injection. Indeed, in a motion seeking a stay of execution, Mr. Hill expressly stated that he "is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is 'seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the "fact" or "validity" of the sentence itself – by simply altering its method, the State can go forward with the sentence.'" Application for a Stay of Execution and for Expedited Appeal at 12 (quoting *Nelson*, 541 U.S. at 644) (footnote omitted), J.A. 46.

The district court denied relief on January 21, 2006. The court believed that Eleventh Circuit precedent dictated dismissal for lack of subject matter jurisdiction. J.A. 12-15 (citing *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004), and *In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000)). Specifically, the court held that under *Robinson* and *Provenzano*, Hill's § 1983 claim was "the functional equivalent of a successive petition for writ of habeas corpus." J.A. 15. Having recharacterized the § 1983 claim in that manner, the court dismissed the claim for lack of subject matter jurisdiction because Hill had not first sought permission from the Eleventh Circuit to file a successive habeas petition pursuant to 28 U.S.C. § 2244(b), and because he could not, in the district court's view, have obtained permission if he sought it. The district court's decision rested on its description of Mr. Hill's complaint as one that sought "a permanent injunction barring the execution of his

death sentence" (J.A. 12) – notwithstanding that the complaint expressly sought only the narrower relief of an injunction "barring defendants from executing Plaintiff *in the manner they currently intend.*" Compl. ¶ 20 (emphasis added), J.A. 22.

The district court did not mention this Court's decision in *Nelson v. Campbell* or apply the analysis set forth in that decision for determining when a challenge to the procedures used for execution by lethal injection can properly be brought pursuant to § 1983. Nor did the court mention the fact that Mr. Hill could not have brought his Eighth Amendment challenge during his prior federal habeas proceedings because the claim would have been manifestly unripe at that point.

Hill filed an emergency appeal in the Eleventh Circuit, which affirmed the district court on January 24, 2006. Like the district court, the Eleventh Circuit described Mr. Hill's complaint as seeking "a permanent injunction barring his execution." J.A. 9. The Eleventh Circuit also failed to mention this Court's decision in *Nelson* or to apply the principles set forth in that decision for determining whether a claim such as the one Mr. Hill actually raised was proper under § 1983. Instead, the Eleventh Circuit agreed with the district court that Mr. Hill's § 1983 claim was properly recharacterized as a successive habeas petition and was properly dismissed for lack of subject matter jurisdiction.

Mr. Hill filed a petition for certiorari and sought a stay from this Court on January 24, 2006. Justice Kennedy granted a temporary stay on January 24, 2006, and the Court granted the petition and a full stay on January 25, 2006.

SUMMARY OF ARGUMENT

The Eighth Amendment prohibits punishments that inflict unnecessary and wanton pain. It permits sentences of death to be carried out, but not in a manner that is more torturous

than necessary to extinguish life. Invoking 42 U.S.C. § 1983, Petitioner Hill contends that the procedures the Florida Department of Corrections intends to use to execute him violate the Eighth Amendment because those procedures subject him to needless excruciating pain before death. Characterizing Mr. Hill's claim as a challenge to Florida's authority to execute him, the Eleventh Circuit held that Mr. Hill could not pursue the claim in a § 1983 action, and further held that he could not pursue it in a habeas corpus action because such an action would be an improper "second or successive" petition within the meaning of 28 U.S.C. § 2244(b). Thus, the Eleventh Circuit denied Mr. Hill any federal forum to adjudicate his Eighth Amendment claim.

Nelson v. Campbell requires reversal of the Eleventh Circuit's decision. *Nelson* squarely holds that a condemned inmate may bring a § 1983 action to challenge a State's proposed lethal injection procedures so long as judicial relief prohibiting the procedure would not "*necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647 (emphasis in original). Under that standard, Mr. Hill plainly has the right to proceed with his § 1983 action. He challenges only the particular procedures the Department of Corrections will employ in executing him, and the permanent relief he seeks is limited to an injunction barring the Department from executing him "in the manner they currently intend" to use. Compl. ¶¶ 19-20, J.A. 22. Moreover, he has acknowledged that he could be executed by a different means of lethal injection chosen by the Department. J.A. 46 ("by simply altering its method, the State can go forward with the sentence" (quoting *Nelson*, 541 U.S. at 644)). In no sense can his claim be characterized as a challenge to the fact or duration of his confinement (or to the State's authority to execute him) that is cognizable only in federal habeas proceedings. *Cf. Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). Thus, as in *Nelson*, the Eleventh Circuit erred in holding that Mr. Hill's § 1983 action should

be recharacterized as a "second or successive" habeas petition and dismissed for lack of subject matter jurisdiction.

Even if Mr. Hill's § 1983 complaint were recharacterized as a habeas petition, the Eleventh Circuit erred in concluding that it was a "second or successive" petition subject to the gatekeeping restrictions of 28 U.S.C. § 2244(b). This Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), establish that the statutory phrase "second or successive petition" is a term of art that draws its meaning from the Court's "abuse of the writ" doctrine. Under this settled understanding of the meaning of the statutory term, Mr. Hill's recharacterized § 1983 action was not a "second or successive" petition because his Eighth Amendment claim was not ripe (indeed it lacked any factual or legal predicate) until after his federal habeas proceedings were final. *Martinez-Villareal*, 523 U.S. at 644; *Slack*, 529 U.S. at 486. Even on its own terms, therefore, the Eleventh Circuit erred in holding that the district court lacked subject matter jurisdiction to consider Mr. Hill's Eighth Amendment claim.

In sum, the Eleventh Circuit has advanced no valid reason for dismissing Mr. Hill's § 1983 action. That action, which is on all fours with *Nelson*, raises an Eighth Amendment claim within the "literal applicability" of § 1983, does not "challenge the fact or duration" of Mr. Hill's confinement (or the State's authority to execute him using more humane lethal injection procedures), and in no sense constitutes an effort to evade the procedural limitations that apply to habeas actions. *See Nelson*, 541 U.S. at 643, 647. Thus, the Eleventh Circuit should be reversed.

ARGUMENT

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 392

(1972)). This Court has long held that the Eighth Amendment protects prisoners from the "gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183 (citing *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) and *In re Kemmler*, 136 U.S. 436, 447 (1890)). In the capital punishment context, where the suffering inflicted in executing a condemned prisoner is caused by procedures involving "something more than the mere extinguishment of life," the Eighth Amendment's prohibition against cruel and unusual punishment is implicated. *See Furman v. Georgia*, 408 U.S. 238, 265 (1972) (quoting *Kemmler*, 136 U.S. at 447).

On occasion, the circumstances giving rise to a constitutional claim of cruelty in the means proposed for conducting an execution do not emerge until after the condemned prisoner has completed federal habeas proceedings. Such circumstances can arise where a State adopts a new and untested method of execution, or where evidence emerges raising the question whether an existing execution method in fact inflicts gratuitous pain or suffering.[5]

This is precisely such a case. Florida did not adopt lethal injection as the presumptive means of execution until January 14, 2000, after Mr. Hill had completed federal habeas corpus proceedings challenging his conviction and sentence. Thus

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[5] For example, in Florida, after electrocuted prisoners caught on fire, were burned and charred, and bled excessively during executions, this Court granted certiorari to review the constitutionality of the procedures involved in using Florida's electric chair. *See Bryan v. Moore*, 528 U.S. 960 (1999), *cert. dismissed*, 528 U.S. 1133 (2000) (dismissing the writ after Florida amended its procedures to provide for lethal injection as the presumptive method of execution); *Provenzano v. Moore*, 744 So. 2d 413, 431-36 (Fla. 1999) (Shaw, J., dissenting) (describing executions), *cert. denied*, 528 U.S. 1182 (2000). By the time of *Bryan*, it had become apparent that Florida's condemned prisoners – both those who had completed federal habeas corpus proceedings and those who had not – faced the possibility of a torturous and needlessly painful execution raising serious constitutional claims that merited federal court review.

he could not have adjudicated *any* challenge to lethal injection during those proceedings – much less the specific narrow challenge he raises to the particular procedures the Department (in its discretion) proposes to use to execute him. Yet under the law of the Eleventh Circuit, no federal court has subject matter jurisdiction to adjudicate his claim. He cannot raise the claim in a federal habeas corpus petition because under the circuit's law it is automatically deemed a second or successive petition and subject to immediate dismissal on that basis. Likewise, he cannot raise the claim in an action brought pursuant to 42 U.S.C. § 1983 because Eleventh Circuit law holds that such claims are the "functional equivalent" of a second or successive habeas petition, and must therefore be "recharacterized" as such and dismissed for lack of subject matter jurisdiction for failure to meet the requirements of 28 U.S.C. § 2244(b).

The Eleventh Circuit's position demonstrates the prescience of Chief Justice Rehnquist's observation in *Martinez-Villareal* that such purblind and far-reaching extensions of § 2244(b) are fraught with "implications . . . [that] would be . . . seemingly perverse." 523 U.S. at 644. It categorically denies Mr. Hill recourse to a forum necessary for the vindication of his rights and does so arbitrarily, on the basis of an accident of timing over which he had no control. This is radically at odds with the fundamental tenet of Anglo-American legal tradition expressed in the maxim *ubi jus, ubi remedium* – where there is a right there is a remedy – a maxim classically viewed as central to the rule of law. Chief Justice Marshall in *Marbury v. Madison* quoted Blackstone for the proposition that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" 5 U.S. (1 Cranch) 137, 163 (1803). And the Chief Justice added that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

This Court's recent unanimous decision in *Nelson v. Campbell* – which reviewed an Eleventh Circuit ruling that, like the one here, denied the petitioner any federal forum for adjudicating an Eighth Amendment challenge to lethal injection procedures – prescribed a rule of decision that avoided this perversity by marking out a clear path through which condemned prisoners such as Mr. Hill can bring challenges pursuant to § 1983, so long as the challenge, if successful, would not preclude a state from carrying out an otherwise valid sentence of death. And, even apart from *Nelson*, this Court had made clear in *Martinez-Villareal* and *Slack* that a habeas petitioner's claim is not to be considered a "second or successive" petition subject to the gatekeeping restrictions of 28 U.S.C. § 2244(b) if the claim could not have been brought (because it did not exist or was not ripe) at the time of the petitioner's first federal habeas proceedings.

In this case, those two lines of clear authority converge. Mr. Hill has an unassailable right to proceed via § 1983 based on this Court's ruling in *Nelson*. And his claim was not properly dismissed as a "second or successive" claim under the logic of *Martinez-Villareal* and *Slack* because they did not become ripe until long after his first federal habeas proceedings concluded. Therefore, even if the Eleventh Circuit were correct (and it is not) that Mr. Hill's entitlement to raise his claim in a § 1983 proceeding would be defeated if the claim were tested on the rules applicable to second or successive habeas petitions, the plain fact is that the latter rules would *permit* a habeas adjudication of Mr. Hill's cruel-and-unusual-method-of-execution claim. Mr. Hill's resort to the civil remedy specifically designed by Congress for the relief of persons imminently threatened by irremediable state action that would violate their federal civil rights is in no sense an end-run around the jurisdictional limits of 28 U.S.C. § 2244(b).

Thus, the Eleventh Circuit's disposition of Mr. Hill's Eighth Amendment claim was erroneous and should be reversed.

I. MR. HILL'S CLAIM IS PROPERLY BROUGHT UNDER 42 U.S.C. § 1983 BECAUSE HE CHALLENGES ONLY THE PARTICULAR PROCEDURES THE DEPARTMENT OF CORRECTIONS HAS CHOSEN TO USE TO EXECUTE HIM AND NOT THE STATE'S AUTHORITY TO EXECUTE HIM BY LAWFUL MEANS.

Nelson v. Campbell holds that a condemned inmate's challenge to a specific process for implementing the State's chosen method of execution presents a cognizable claim under 42 U.S.C. § 1983, so long as the inmate's challenge would not "*necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647 (emphasis in original). Mr. Hill's complaint falls squarely within the holding of *Nelson*. He contends only that the particular procedures that the Department (in its discretion) has chosen to use to execute him violate the Eighth Amendment by causing unnecessary and torturous pain. He concedes that other methods of lethal injection the Department could choose to use would be constitutional, and he seeks to enjoin the Department only from carrying out the execution "in the manner they currently intend." Here, as in *Nelson*, "by simply altering its method of execution, the State can go forward with the sentence." 541 U.S. at 644.

The courts below held that habeas corpus provided the exclusive means for raising Mr. Hill's challenge, and then dismissed that challenge as "the functional equivalent of a successive habeas petition." J.A. 9-10, 15. But the case law on which they rely pre-dates and cannot survive *Nelson*. Because Mr. Hill's claim is materially indistinguishable from that in *Nelson*, the decision below should be reversed.

A. *Nelson v. Campbell* Permits An Action Under 42 U.S.C. § 1983 To Challenge The Process For Carrying Out A Lethal Injection.

Mr. Hill has appropriately invoked § 1983 to pursue his Eighth Amendment claim. Section 1983 authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Mr. Hill's lawsuit seeks to bar Florida from executing him using particular lethal injection procedures that impose unnecessary and torturous pain and suffering. Mr. Hill thus plainly seeks to vindicate rights and immunities secured to him by the Eighth Amendment.

As this Court has explained, federal law provides two avenues for prisoners' complaints related to their confinement: section 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254. *See Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam); *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). Habeas is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement. *Heck*, 512 U.S. at 481; *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). By contrast, constitutional claims that challenge how a lawfully imposed sentence is carried out fall outside the core of habeas and are cognizable under § 1983. *See Nelson*, 541 U.S. at 643; *Muhammad*, 540 U.S. at 750.

To be sure, where the recognition of a claim will necessitate a finding that a state prisoner's underlying conviction or sentence is invalid, the prisoner bringing such a claim must file a habeas corpus petition. *See Preiser*, 411 U.S. at 500 ("when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate

release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus"). Where, however, an inmate's claim challenges the constitutionality of procedures that are ancillary to the prisoner's conviction and sentence and can be corrected without undermining the integrity of the underlying conviction or sentence, then § 1983 relief is available. *See Heck*, 512 U.S. at 487 (finding that state prisoners may bring § 1983 actions if a judgment in the prisoner's favor would not "necessarily imply" the invalidity of his or her conviction or sentence); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that § 1983 was a permissible avenue of relief when adjudication of a prisoner's claim would not undermine the outcome of disciplinary proceedings).

Applying this settled law, *Nelson* addressed whether § 1983 is a proper vehicle for challenging the specific procedure a State uses to carry out a death sentence. In *Nelson*, a condemned prisoner filed a § 1983 challenge to the "cut-down" procedure to be used to access his veins for lethal injection, contending that the procedure would inflict unnecessary pain and suffering prior to his death. *Nelson*, 541 U.S. at 642, 645. Nothing in the Alabama statutes prescribing lethal injection as the method of execution for that State's condemned prisoners required such a procedure. The Eleventh Circuit nonetheless held that the § 1983 claim had to be dismissed for want of subject matter jurisdiction because it was the functional equivalent of a second or successive habeas petition subject to the gatekeeping provisions of 28 U.S.C. § 2244(b). *Id.*

This Court reversed, holding that a condemned person may bring a § 1983 challenge to a specific lethal injection procedure, so long as judicial relief prohibiting the procedure would not "*necessarily* prevent [the State] from carrying out its execution." *Id.* at 647 (emphasis in original). That is so because "[a] suit seeking to enjoin a particular means of

effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself." *Id.* at 644. Rather, it challenges how the State carries out a lawfully imposed sentence. Such an approach is entirely consistent with *Preiser* and its progeny, and "both protects against the use of § 1983 to circumvent any limits imposed by the habeas statute and minimizes the extent to which the fact of a prisoner's imminent execution will require differential treatment of his otherwise cognizable § 1983 claims." *Id.* at 674.

Applying that standard, the Court held that Nelson's action fell squarely within the ambit of § 1983. The "venous access" procedure there at issue was not mandated by state law, and Nelson conceded that other procedures for gaining access were constitutional. Nelson's challenge thus did not *necessarily* imply the invalidity of the inmate's conviction or the State's ability ultimately to carry out the death sentence. Nelson could therefore proceed under §1983.

B. Mr. Hill's Case Is Indistinguishable From *Nelson* And Thus The Eleventh Circuit Erred In Dismissing Mr. Hill's § 1983 Claim.

Mr. Hill's claim is indistinguishable from the claim at issue in *Nelson*. He alleges that the particular procedures the Department has chosen to use for his execution "create[] a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed" in violation of the Eighth Amendment. Compl. ¶ 8, J.A. 18; *see also id.* ¶¶ 9-16, J.A. 18-21. Like Mr. Nelson, therefore, Mr. Hill challenges only a specific method of administering lethal injection. He does not assert that that lethal injection *per se* violates the Eighth Amendment, and he does not contest the State's authority to carry out his execution. To the contrary, Mr. Hill seeks relief limited to an injunction "barring defendants from executing Plaintiff *in the manner they currently intend*." Compl. ¶¶ 19-20 (emphasis added), J.A. 22. Were his action successful,

Mr. Hill could still be executed by a different procedure, including a different means of lethal injection chosen by the Department. Indeed, in his district court submissions, Mr. Hill expressly stated that "'by simply altering its method, the State can go forward with the sentence.'" Application for a Stay of Execution and for Expedited Appeal at 12, J.A. 46 (quoting *Nelson*, 541 U.S. at 644). Mr. Hill's challenge is thus plainly proper under § 1983, because it does not "necessarily imply" the invalidity of the fact or length of the inmate's sentence. *See Nelson*, 541 U.S. at 646.[6]

Ruling for Mr. Hill does not require this Court to address any of the questions this Court reserved in *Nelson*. The case does not present, for example, the broader question of how to address general method-of-execution claims, such as a challenge to electrocution or hanging. Nor is Mr. Hill's Eighth Amendment challenge one that seeks *sub silentio* to

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[6] If anything, this case is easier than *Nelson*. Nelson's complaint requested "an order granting injunctive relief and staying [petitioner's] execution." *Nelson*, 541 U.S. at 648 (alteration in original). The Court indicated that this phrasing complicated the issue, because the request for a permanent injunction "did not specify what permanent injunctive relief [petitioner] was seeking," *id.*, and therefore might have "transformed his conditions of confinement claim into a challenge to the validity of his death sentence," *id.* at 647. Despite this inartful phrasing, this Court concluded that "a fair reading of the complaint leaves no doubt that petitioner was asking only to enjoin the State's use of the cut-down, not his execution by lethal injection." *Id.* at 648.

Hill's filings below make unmistakably clear that he seeks only to bar the State's corrections officials from executing him before his claim has been heard and from executing him "in the manner they currently intend." Compl. ¶¶ 19-20, J.A. 22; *see also* Application for a Stay of Execution and for Expedited Appeal at 12, J.A. 46 ("Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is 'seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the "fact" or "validity" of the sentence itself – by simply altering its method, the State can go forward with the sentence.'") (quoting *Nelson*, 541 U.S. at 644).

preclude imposition of the death penalty by implying that all methods of execution are cruel and unusual. To the contrary, Hill alleges only that the particular procedures the Department intends to use to execute him create a foreseeable risk of wanton pain. His is not a challenge objecting merely to the pain inherent in death.

Mr. Hill's claim similarly does not require the Court to determine the proper outcome in the situation left unresolved in *Nelson* – where the challenged execution practices are dictated by statute. 541 U.S. at 645. The relevant Florida statute authorizes lethal injection, but dictates no particular procedure for carrying it out. *See* Fla. Stat. § 922.10 ("A death sentence shall be executed by electrocution or lethal injection."). Nor does any Florida regulation require the specific procedures at issue here. The Department of Corrections therefore has complete discretion to change the method of lethal injection to comply with the Eighth Amendment – at any time and for any reason. *See Sims*, 754 So. 2d at 670.

Indeed, the Department could readily adopt any one of a number of different approaches to lethal injection that would end Mr. Hill's life without a foreseeable likelihood of excruciating pain. *See, e.g., Morales*, 2006 WL 335427, at *8. It could therefore afford Mr. Hill all of the relief he seeks in this lawsuit without requiring "statutory amendment or variance" that might "impos[e] significant costs on the State and the administration of its penal system." *Nelson*, 541 U.S. at 644.[7]

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[7] For these reasons, it is impossible to construe Mr. Hill's claim as the equivalent of a direct challenge to Florida's statutorily prescribed method of execution. But even if it were such a challenge, his claim would still be properly brought under § 1983 because no statutory changes would be required if the challenge succeeded. Florida statutes *already* provide for the enforcement of a death sentence even if the statutorily prescribed method of execution is held unconstitutional. *See* Fla. Stat. § 922.105(3)

Because *Nelson* is plainly controlling in this circumstance, it is not surprising that, with the exception of the Eleventh Circuit, every court of appeals to have addressed the question has recognized that claims challenging particular lethal injection procedures (but not the state's authority to carry out execution by lethal injection) may proceed under § 1983. *See, e.g.*, *White v. Johnson*, 429 F.3d 572, 573 (5th Cir. 2005) (per curiam); *Beardslee v. Woodford*, 395 F.3d 1064, 1068 (9th Cir.), *cert. denied*, 543 U.S. 1096 (2005); *Reid v. Johnson*, 105 Fed. Appx. 500, 503 (4th Cir. 2004); *Bryan v. Mullin*, 100 Fed. Appx. 801, 802-03 (10th Cir 2004), *cert. denied*, 541 U.S. 1096 (2005); *see also Johnston v. Crawford*, No. 04CV1075, 2005 WL 1474022, at *2 (E.D. Mo. June 13, 2005); *Ross ex rel. Ross v. Rell*, 392 F. Supp. 2d 224, 226 (D. Conn. 2005).

The Eleventh Circuit's divergent approach appears to result from its consistent practice of treating every challenge to particular procedures for administering a lethal injection as equivalent to a challenge to the state's authority to carry out *any* execution. For example, in *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004) (per curiam), the Eleventh Circuit construed Mr. Robinson's challenge to Florida's method of administering lethal injection as a broad contention that "seeks to avoid entirely execution by lethal injection" – notwithstanding that Robinson's complaint appeared to challenge only the particular procedures that were to be used in executing him. 358 F.3d at 1285. Similarly, in the present case, the Eleventh Circuit erroneously characterized Mr. Hill's claim as one that "seeks a permanent injunction barring his execution," and on that basis dismissed it on the ground that it raised "the very issue" that was decided in *Robinson*. J.A. 10; *see also Rutherford v. Crosby*, No. 06-

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("If electrocution or lethal injection is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution."); *id.* § 922.105(8).

10783, __ F.3d __, 2006 WL 224123, at *1 (11th Cir. Jan. 30, 2006) (per curiam) (invoking *Robinson* to dismiss a claim expressly challenging only "the procedures or protocols" used to carry out lethal injections). By characterizing the claims brought in these cases as seeking relief broader than they in fact seek, the Eleventh Circuit has apparently felt no need to come to grips with the rule set forth in *Nelson*. Because Mr. Hill's claim is not the broad one the Eleventh Circuit ascribed to him, however, *Nelson* plainly applies here. The district court thus had subject matter jurisdiction to adjudicate his claim.

C. Allowing Mr. Hill's Claim To Proceed Is Consistent With The Language And Purpose Of 42 U.S.C. § 1983, As Well As This Court's Longstanding Case Law.

Allowing Mr. Hill to proceed with his § 1983 claim is consistent with the language, purpose, and history of that statute. Hill's invocation of the Eighth Amendment to challenge the particular procedures the Department has chosen to use to end his life satisfies all the statutory elements of § 1983. It is a suit in equity against a state official who, under color of state law, is causing Hill to be deprived of the Eighth Amendment's protections against cruel and unusual punishment. *See Nelson*, 541 U.S. at 643 (noting that Nelson's claim falls within the "literal applicability" of § 1983).

Permitting Hill's claim to proceed is also consistent with the purpose of § 1983. The Civil Rights Act was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyments of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by these state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*,

436 U.S. 658 (1978). The State's callous indifference to Hill's constitutional concerns – whether motivated by prejudice, neglect, intolerance, or something else – falls within the intended scope of the Civil Rights Act. Because § 1983 authorizes injunctive actions challenging barbaric conditions of confinement, *see, e.g., Hutto v. Finney*, 437 U.S. 678, 681-83 (1978), it can hardly be supposed that the statute does not also provide a cause of action to challenge a barbaric method of execution. Similarly, because an inmate could bring a § 1983 action challenging the constitutionality of a callously painful chemical prescription used to provide medical treatment, the result cannot plausibly be different when the chemicals chosen to effectuate an execution produce unnecessary pain. *See Nelson*, 541 U.S. at 645 ("Merely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack.").

Section 1983 has been traditionally interpreted, furthermore, to extend to inmate suits where, as here, the challenged procedures can be restrained or corrected without impugning the integrity of the underlying conviction and sentence, *i.e.*, without seeking "core" habeas corpus relief. *Wilkinson v. Dotson*, 125 S. Ct. 1242, 1247 (2005). This relationship between § 1983 and federal habeas corpus has deep roots. Indeed, "[a]t the time of § 1983's adoption, the federal habeas statute mirrored the common-law writ of habeas corpus, in that it authorized a single form of relief: the prisoner's immediate release from custody." *Dotson*, 125 S. Ct. at 1250 (Scalia, J., concurring). Section 1983, therefore, would have presented the vehicle for relief outside of immediate release. Although the federal habeas statute has since been amended to provide "relief short of release," *id.*, a distinction between claims that lie within the "core of habeas" and those that are cognizable under § 1983 remains intact. *Dotson*, 125 S. Ct. at 1246 (quoting *Preiser*, 411 U.S. at 487).

Just last term, the Court held that two state prisoners' challenge to Ohio's state parole procedures was properly brought under § 1983, because the action did not lie "within the core of habeas corpus." *Dotson*, 125 S. Ct. at 1246 (quoting *Preiser*, 411 U.S. at 487). The Court explained that actions lie within the core of habeas where they challenge the "'fact or duration of . . . confinement' and seek[] either 'immediate release from prison,' or the 'shortening' of [the] term of confinement." *Id.* (quoting *Preiser*, 411 U.S. at 482, 489) (internal citations omitted). In other words, a state prisoner's § 1983 action is only barred "*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 125 S. Ct. at 1248 (emphasis in original). Because the two state prisoners sought declaratory and injunctive relief regarding the *procedures* used to deny parole eligibility and suitability, rather than an injunction ordering immediate or speedier release, the actions were cognizable under § 1983. *Id.*; *see also id.* at 1250 (Scalia, J., concurring) ("[W]hat is sought here [is] the mandating of a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed. A holding that this sort of judicial immersion in the administration of discretionary parole lies at the 'core of habeas' would utterly sever the writ from its common-law roots.").

The Court's opinion in *Dotson* traverses the "legal journey from *Preiser* to [*Edwards v.*] *Balisok*," and clarifies that, in every case,

> the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement – either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily

> implies the unlawfulness of the State's custody. Thus, *Preiser* found an implied exception to § 1983's coverage where the claim seeks – not where it simply 'relates to' – 'core' habeas corpus relief, *i.e.*, where a state prisoner requests present or future release.

125 S. Ct. at 1247 (emphasis in original).

In *Wolff v. McDonnell*, for instance, the inmate's § 1983 complaint sought restoration of good-time credits and damages for the deprivation of civil rights resulting from the use of an allegedly unconstitutional procedure to determine those credits. *See Wolff*, 418 U.S. at 553; *see also Heck*, 512 U.S. at 482 (construing *Wolff*). This Court found the § 1983 claim for restoration of good time credits foreclosed under *Preiser*, but permitted the use of § 1983 to obtain a declaration that the disciplinary procedures were invalid, as well as "ancillary relief," *Wolff*, 418 U.S. at 554-55 (emphasis added), because "[i]n neither case would victory for the prisoners necessarily have meant immediate release or a shorter period of incarceration; the prisoners attacked only the 'wrong procedures, not . . . the wrong result . . . .'" *Dotson*, 125 S. Ct. at 1246-47 (quoting *Heck*, 512 U.S. at 483 (discussing *Wolff*)); *see also Wolff*, 418 U.S. at 555 ("[A] declaratory judgment as a predicate to a damages award would not be barred by *Preiser*; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.").

Following the same reasoning, this Court concluded in *Heck* that an inmate's claim for damages was not cognizable under § 1983, when establishing the basis for damages would necessarily demonstrate the invalidity of the conviction or sentence. 512 U.S. at 481-82. Like *Preiser*, *Heck* recognized that the dividing line was whether the plaintiff

was challenging the fact or duration of his sentence, or something else. Thus, a state prisoner who has not received favorable termination of a state or federal habeas petition cannot state a cognizable § 1983 claim to recover damages for a "harm caused by actions whose unlawfulness would render [his] conviction or sentence invalid." *Id.* at 486; *see also Nelson*, 541 U.S. at 646. But if "plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the [§ 1983] action should be allowed to proceed." *Heck*, 512 U.S. at 487 (emphasis in original); *see also Edwards v. Balisok*, 520 U.S. 641, 646-48 (1997) (holding, in a challenge to prison procedures depriving inmate of good-time credits, that the claims for declaratory and monetary relief that "necessarily imply the invalidity of the punishment imposed" could not be brought under § 1983, but that a claim for injunctive relief barring future procedures was permitted, because "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits").

Nelson is entirely consistent with this line of cases. It holds that § 1983 is available for the inmate who challenges the specific procedure by which he will be executed, as opposed to the validity of the death sentence itself. 541 U.S. at 644-45. *Nelson* thus preserves this Court's repeated teaching that claims that do not attack the fact or duration of confinement and thus lie outside the core of habeas corpus are cognizable under § 1983.

Indeed, *Nelson* was an even clearer case than *Dotson*. Whereas the prisoners' claim in *Dotson* "would not *necessarily* spell speedier release," 125 S. Ct. at 1247 (emphasis added), method-of-execution challenges, like the challenge at issue in *Nelson* and the claim presented here by Mr. Hill, necessarily contemplate that the inmate's death sentence will be carried out; they challenge only specific

aspects of the procedure that entail gratuitous pain. *See Nelson*, 541 U.S. at 645. Allowing Mr. Hill's claim to proceed is thus entirely consistent with § 1983's place in our constitutional and legal system.

For all the foregoing reasons, Mr. Hill's narrow challenge to the specific procedures chosen by the Florida Department of Corrections is properly brought pursuant to § 1983. Mr. Hill does not challenge his sentence of death by lethal injection, but only specific aspects of the State's means for carrying out that sentence. The Eleventh Circuit plainly erred, therefore, in dismissing the suit for lack of jurisdiction.

II. MR. HILL'S CHALLENGE IS NOT A SECOND OR SUCCESSIVE PETITION UNDER AEDPA.

Because *Nelson* establishes Mr. Hill's right to proceed under § 1983, it suffices to require a reversal of the Eleventh Circuit's determination that the district court lacked jurisdiction to adjudicate his Eighth Amendment challenge to the manner of his execution. Nevertheless, there is an additional reason why the Eleventh Circuit's decision fails on its own terms. Even if Mr. Hill's § 1983 complaint were recharacterized as a habeas challenge, it would not be a "second or successive" petition subject to the gate-keeping provisions in § 2244(b). Thus, there was no basis whatsoever for concluding that the district court lacked subject matter jurisdiction over Mr. Hill's claim that the Department of Corrections means to put him to death in a torturous manner that violates the Eighth Amendment. His invocation of § 1983 cannot plausibly be construed as an evasion of the jurisdictional restrictions on habeas corpus.

Section 2244(b) requires petitioners who seek to file a "second or successive" habeas corpus petition to obtain leave from the appropriate court of appeals, 28 U.S.C. § 2244(b)(3), and it permits the court of appeals to grant such leave only in narrow circumstances, *see id.* § 2244(b)(1),

(2).[8] This Court, however, has consistently rejected the view that § 2244(b) applies to all claims brought in a *numerically* "second" (or subsequent) petition. It has recognized, rather, that the phrase "second or successive" in § 2244(b) is a "term of art" that draws its meaning from this Court's "abuse of the writ" doctrine. *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). That settled understanding of the statute puts a constitutional claim such as Mr. Hill's here – a claim that was not ripe at the time when the initial federal habeas petition was filed and decided and which ripened only shortly before the filing of a second petition – outside the scope of § 2244(b)'s gate-keeping provisions.

In *Martinez-Villareal*, for example, the prisoner had earlier filed a habeas petition contending, among other things, that he was incompetent to be executed under *Ford v. Wainright*, 477 U.S. 399 (1986). The district court denied the petition, dismissing the *Ford* claim as unripe because no execution date was imminent. Once a new execution date was set, thus rendering the *Ford* claim ripe for adjudication, Martinez-Villareal sought to raise the *Ford* claim again, and the State challenged the filing as a successive petition. Affirming the Ninth Circuit – which had disagreed with the approach of the Eleventh Circuit in *In re Medina*, 109 F.3d

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[8] Section 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under [28 U.S.C. § 2254] that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

1556 (11th Cir. 1997) – this Court held that the presentation of the previously unripe *Ford* claim did not constitute a second or successive petition. Invoking this Court's pre-AEDPA jurisprudence, *see Martinez-Villareal*, 523 U.S. at 644-45, the Court noted that the State's reading of § 2244(b)(2) to bar claims that were previously unripe would effect a substantial departure from prior practice and that the "implications [of the State's argument] for habeas practice would be far reaching and seemingly perverse." 523 U.S. at 644.

Under *Martinez-Villareal*, Hill's challenge to the particular procedures that the Florida Department of Corrections intends to use to execute him is not a "second or successive" petition. As noted above, Florida law gives the Department of Corrections total discretion to develop and implement the process for executing prisoners for lethal injection. Neither the combination of chemicals nor the procedures for mixing and injecting them (and monitoring their effects) are prescribed in statute or regulation. The Department retains complete flexibility to devise and implement injection protocols for any particular execution; and, as Mr. Hill's case demonstrates, the Department aggressively resists inmates' efforts to obtain advance information about its intended procedures. Thus, it is only when an execution warrant has been signed and the Department of Corrections begins to make its arrangements for a particular execution that any constitutional challenge to the execution procedures which the Department is preparing to use becomes ripe. *See Worthington v. Missouri*, 166 S.W. 3d 566, 583 n.3 (Mo. 2005) (holding that an Eighth Amendment claim challenging a particular lethal injection procedure is "premature" because "it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as Mr. Worthington's right to seek relief in state and federal court is concluded and his execution method and date are set"). And

once such a constitutional challenge ripens, *Martinez-Villareal* permits it to be raised on federal habeas without a gatekeeping application under § 2244(b), notwithstanding that the condemned inmate has had his underlying conviction and sentence reviewed in a previous federal habeas proceeding.

To be sure, the Court in *Martinez-Villareal* reserved the question of how its decision would apply to a previously unripe claim that had not been presented on first federal habeas. 523 U.S. at 645 n.*. The Court's decision, however, leaves no doubt of the outcome. *See generally Clark v. Martinez*, 543 U.S. 371, 378 (2005) (finding that the logic of a prior opinion compelled the answer to question expressly reserved in that opinion). The Court ruled as it did even though the district court in *Martinez-Villareal* had rendered a final judgment denying the initial habeas petition and had not held the initial *Ford* claim in abeyance. The subsequent filing raising the ripened claims was thus in no sense a "continuation" of the first petition, as the dissent emphasized. *See Martinez-Villareal*, 523 U.S. at 650 (Thomas, J. dissenting). The plain import of *Martinez-Villareal*, therefore, is that timely presentation of a previously unripe claim is not a second or successive petition under AEDPA, and that a prisoner should have at least one opportunity to present his federal claims to the federal court. To hold otherwise would deny a habeas petitioner the opportunity to obtain the "adjudication of his claim" to which he is entitled. *Martinez-Villareal*, 523 U.S. at 645.[9]

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[9] The rule of *Martinez-Villareal* cannot conceivably be that, in order to bring their possible future claims within it, inmates are required to anticipate the various possible constitutionally challengeable actions which correctional officers might (or might not) later take in the course of execution of the inmate's sentence and to insert those challenges into ever initial federal habeas petition. Such a rule would impose a staggering burden on the district courts to receive and read through premature claims for no purpose other than to cull them out. Furthermore, such a game of

Slack confirms this reading of *Martinez-Villareal*. *See Slack*, 529 U.S. at 486. In *Slack*, the district court dismissed the state prisoner's initial federal habeas petition because it contained claims that had not yet been litigated in state court. Once the prisoner had gone to state court and exhausted his claims, he returned to federal court and eventually filed a new petition, adding claims that had not been raised in the initial petition. This Court squarely rejected the State's contention that the subsequent petition was a "second or successive petition" as that term was used in AEDPA. *Id.*

Justice Kennedy's opinion for seven members of the Court recognized that the term "second or successive petition" in AEDPA was a "term of art given substance in our prior habeas corpus cases." 529 U.S. at 486; *see also Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'"). Thus, as in *Martinez-Villareal*, the Court looked to its pre-AEDPA "second or successive" cases – in particular *McCleskey v. Zant*, 455 U.S. 509 (1991), and *Rose v. Lundy*, 455 U.S. 509 (1982) – to give meaning to the term. Because Slack's claims would not have been considered an abusive "second or successive petition" as the Court had defined that term of art, § 2244(b)(2) did not bar Slack's claims.

The same analysis demonstrates that Hill's presentation of his newly ripened claim is not "second or successive." A federal habeas petition presenting a claim that was unripe at the time of a previous petition would not have been an abusive successive petition prior to AEDPA. The abuse-of-the-writ doctrine received its fullest treatment in Justice Kennedy's opinion in *McCleskey*. There the Court noted that

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"what if" contravenes the basic tenet of our system of adjudication, that claims are brought when they are sufficiently concrete to permit non-speculative, fact-informed resolution.

"the abuse-of-the-writ doctrine ... concentrate[s] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." 499 U.S. at 490. It has never been thought an abuse of the writ to fail to raise an unripe claim in one's first federal habeas petition and then, after the claim ripens, to base a later habeas petition upon it. *See id.* at 493-94; *see also* 2 Randy Hertz & James S. Leibman, *Federal Habeas Corpus Practice and Procedure* § 28.3b at 1410 (5th ed. 2005) (noting that, pre-AEDPA, a petition was not subject to the rules governing "successive" petitions when the "earlier petition did not produce, or for some reason could not possibly have produced, a judgment on the merits of the claim in question"); *see also id.* (noting that AEDPA "preserves the preexisting law's recognition" that such claims are "not subject to statutory and common law restrictions upon successive petitions").

In short, the abuse-of-the-writ principles expressly made relevant by *Slack* and *Martinez-Villareal* do not require the futile act of raising in a first federal habeas petition a claim known to be unripe. Thus AEDPA's gatekeeping provisions do not apply to Mr. Hill's challenge, which was brought as soon as the signing of his execution warrant caused his constitutional claim to ripen.

The Eleventh Circuit's holding to the contrary is even more troubling because the court characterized as second or successive a constitutional claim that not only was previously unripe but also had no factual or legal predicate at all at the time of Mr. Hill's initial federal habeas proceeding. Florida did not enact its lethal injection statute until January 14, 2000, years after Mr. Hill's federal habeas petition challenging his current sentence was filed and, indeed, after that denial became final. *See Hill v. Moore*, 528 U.S. 1087 (Jan. 10, 2000) (denying certiorari). Reading the habeas statutes (as did the Eleventh Circuit) to foreclose even a

claim that did not exist and could not possibly have been brought until after the completion of an inmate's earlier federal habeas proceeding has no colorable basis in this Court's "abuse of the writ" jurisprudence, which provides the relevant context here. *Felker*, 518 U.S. at 652 (citing *McCleskey*); *Slack*, 529 U.S. at 486 (relying on "our prior decisions regarding successive petitions and abuse of the writ" and citing *McCleskey*); *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (noting that "this Court has created careful rules for dismissal of petitions for abuse of the writ" (citing *McCleskey*)).[10]

It is no surprise, therefore, that the Eleventh Circuit stands virtually alone in adopting a complete bar on substantial constitutional claims that could not have been raised during a first federal habeas proceeding. *See Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (en banc) ("a habeas petition raising a claim that had not arisen at the time of a previous petition is not barred by § 2244(b) or as an abuse of the writ"); *see also In re Cain*, 137 F.3d 234, 236-37 (5th Cir. 1998); *Coe v. Bell*, 209 F.3d 815, 823 (6th Cir. 2000); *James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002); *see also Allen v. Ornoski*, No. Civ.50664FCDDAD, 2006 WL 83384 (E.D. Cal. Jan. 12, 2006), *aff'd*, 435 F.3d 946 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1140 (2006); *Nguyen v. Gibson*, 162 F.3d 600, 601 (10th Cir. 1998) (dismissing *Ford*

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[10] As the lower courts have recognized, reading AEDPA to bar review of claims that could not have been brought on first federal habeas would implicate serious constitutional concerns under the Suspension Clause, and principles of constitutional avoidance, *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), thus provide yet another reason for rejecting the Eleventh Circuit's approach. *See, e.g., James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002) (Winter, J.) ("Denial of habeas relief in the present case may implicate the Suspension Clause, because it would constitute a complete denial of any collateral review of a claim that arose only after James filed his 1997 petition.").

claim that could have been raised in first habeas petition, but specifically noting that it would be a different situation if the grounds for the claim came to light only after the first federal habeas petition was filed).

The Eleventh Circuit viewed this case as lying at the crossroads of habeas and § 1983, and held that the obstacles it perceived as blocking Hill's route to habeas relief would similarly foreclose Hill from proceeding via § 1983. That view led the court to the conclusion that the federal courts lack jurisdiction over Hill's claim because it is the "functional equivalent of a successive habeas petition."

But the Eleventh Circuit's reasoning was doubly misguided. The prospect that a claim might be barred in habeas is of no moment if the claim does not challenge the "fact or duration" or "validity" of the conviction or sentence (or the State's authority to execute him using more humane lethal injection procedures). *See Dotson*, 125 S. Ct. at 1247 (recognizing "an implied exception to § 1983's coverage where the claim seeks – not where it simply 'relates to' – 'core' habeas relief, *i.e.*, where a state prisoner requests present or future release"). District courts plainly have subject matter jurisdiction to consider such a claim in a § 1983 action.

Equally to the point, the fear that Hill is somehow "evading" an otherwise applicable habeas bar provides no justification for straining to recharacterize Hill's § 1983 action. The presentation of a recently ripened claim is not a "successive" petition, and thus nothing in § 2244(b) or elsewhere in the habeas statutes or this Court's habeas jurisprudence would bar Hill's Eighth Amendment claim even if it were presented in a habeas petition. The rule developed by this Court that "§ 1983 must yield to the more specific federal habeas statute with its attendant procedural and exhaustion requirements," *Nelson*, 541 U.S. at 643, is "necessary to prevent inmates from doing indirectly . . . what

they could not do directly . . . – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute," *id.* at 647. And where, as in Mr. Hill's case, (1) a habeas petition containing a claim *would* comply with all of those procedural limitations, *and* (2) the claim does *not* "challenge the fact or duration of . . . [the petitioner's] confinement, *and* (3) the inmate presents the claim in a § 1983 complaint that manifestly states a cause of action within the "literal applicability" of § 1983, *Nelson*, 541 U.S. at 643, there is simply no reason to decline jurisdiction to hear the claim.

In short, the Eleventh Circuit's conclusion that the district court lacked subject matter jurisdiction to adjudicate Mr. Hill's claim is meritless on every score.

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Clarence E. Hill v. James V. Crosby, Jr.

Entry Date	Docket Entry
01/23/08	Application for a Stay of Execution and For Expedited Appeal:
01/23/06	Response to Application for a Stay of Execution and for Expedited Appeal:
01/24/06	PUBLISHED ORDER: Appellant Clarence Edward Hill has been convicted of capital murder in Florida & sentenced to death. . . . [W]e DENY appellant's application for a stay of his execution pending appeal. JLE/GBT/WHP(j) (SEE FILE FOR COMPLETE TEXT) - 2 Pgs.
01/24/06	DIS-4 (Letter to district court enclosing court order) issued. To:William McCool; c:Doss, D. Todd; c:Mickie, Stephan P., c:Snurkowski, Carolyn M.
01/24/06	Notice of Filing Certiorari: SC# 05-8794:
01/24/06	DC Order: IFP Denied; COA Denied; Appt. of Counsel Denied
01/24/06	CASE CLOSED

Entry Date	Docket Entry
01/24/06	ORDER: Execution of Sentence of Death is stayed pending further order of the undersigned or of the Court. Justice Anthony M. Kennedy
01/26/06	Motion to Proceed IFP:
02/06/06	Certiorari Granted - Case No. 05-8794:
02/10/06	Appellant's Motion to Proceed IFP is GRANTED. GBT(j)
02/10/06	MOT2 (Notice of court action) issued. c:Carolyn M. Snurkowski; c:D. Todd Doss; c:William McCool

U.S. District Court
Northern District of Florida - District Version
(Tallahassee)
CIVIL DOCKET FOR CASE #: 4:06-cv-00032-SPM

HILL v. CROSBY et al
Assigned to: JUDGE STEPHAN P MICKLE
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 01/20/2006
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
01/20/2006	1	DEATH WARRANT FOR CLARENCE HILL SIGNED BY GOVERNOR BUSH. EXECUTION SET FOR 1/24/06 AT 6:00 P.M. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	2	COMPLAINT (re DEATH WARRANT) against JAMES V CROSBY, JR, CHARLIE CRIST , filed by CLARENCE E HILL. (No filing fee paid, no IFP motion filed.) (Attachments: #1 Attachment A, #2 Attachment B, #3 Attachment C, #4 Appendix A)(cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	3	CIVIL COVER SHEET. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	4	DOCKET ANNOTATION BY COURT: Case forwarded to Florida Supreme Court via UPS on 1/5/2006. Box #1

Date Filed	#	Docket Text
		tracking # 1ZXX60800398946561, box #2 tracking #1ZXX60800399192570, box #31ZXX60800397735380. Miscellaneous Deadline - Clerk to monitor case for return of record to archive once closed by 3/6/2006. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	5	DOCKET ANNOTATION BY COURT: United States Court of Appeals, Eleventh Circuit notified of filing of complaint. Contact person at USCA Joyce Pope, to be notified of any and all orders or stays entered by this court immediately. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006		Set Deadlines: Miscellaneous Deadline - Clerk to monitor status of case by 1/23/2006. (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Stephan P. Mickle notified that action is needed Re: 2 Complaint (re 1 Death Warrant). (cda, Gainesville) (Entered: 01/20/2006)
01/20/2006	6	*RESPONSE TO REQUEST FOR PERMANENT INJUNCTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION* ANSWER to Complaint by JAMES V CROSBY, JR.(SNURKOWSKI,

Date Filed	#	Docket Text
		CAROLYN) (Entered: 01/20/2006)
01/21/2006	7	ORDER Dismissing re 2 Complaint/Motion for Declaratory and Injunctive Relief filed by CLARENCE E HILL, for lack of jurisdiction. No stay of execution will issue in this case. Signed by Judge STEPHAN P MICKLE on 01/21/2006. (pao, Gainesville) (Entered: 01/21/2006)
01/23/2006	9	NOTICE *of Appeal of Order Dismissing Complaint for Declaratory and Injunctive Relief* by CLARENCE E HILL (DOSS, D) (Entered: 01/23/2006)
01/23/2006	10	MOTION to Appoint Counsel by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006	11	MOTION for Leave to Appeal in forma pauperis by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006	12	MOTION for Leave to Proceed in forma pauperis by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006	13	FINANCIAL AFFIDAVIT by CLARENCE E HILL. (DOSS, D) (Entered: 01/23/2006)
01/23/2006		ACTION REQUIRED BY CHAMBERS: Chambers of Judge Stephan P. Mickle notified that action is

Date Filed	#	Docket Text
		needed Re: 10 MOTION to Appoint Counsel, 11 MOTION for Leave to Appeal in forma pauperis, 12 MOTION for Leave to Proceed in forma pauperis, 13 Financial Affidavit (cda, Gainesville) (Entered: 01/23/2006)
01/23/2006	14	NOTICE OF APPEAL as to 7 Order by CLARENCE E HILL. (Clerk reposted to reflect correct event. Please see 9 NOTICE of Appeal of Order Dismissing Complaint for Declaratory and Injunctive Relief for PDF.) Certificate of Readiness due by 2/6/2006.(cda, Gainesville) Additional attachment(s) added on 1/24/2006 (cda, Gainesville). (Entered: 01/23/2006)
01/23/2006	15	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 14 Notice of Appeal. (cda, Gainesville) (Entered: 01/23/2006)
01/24/2006	16	ORDER denying 9 Certificate of Appealability, denying as moot 10 Motion to Appoint Counsel, and denying 11 Motion for Leave to Appeal in forma pauperis; signed by Judge STEPHAN P MICKLE. (tss, Gainesville) (Entered: 01/24/2006)
01/24/2006	17	USDC LETTER Transmitting 16 ORDER denying 9 Certificate of Appealability, denying as moot 10

Date Filed	#	Docket Text
		Motion to Appoint Counsel, and denying 11 Motion for Leave to Appeal in forma pauperis(cda, Gainesville) (Entered: 01/24/2006)
01/27/2006	18	ORDER of USCA as to 14 Notice of Appeal, filed by CLARENCE E HILL. Petitioner's motion for appointment of counsel pursuant to the Criminal Justice Act is GRANTED. (cda, Gainesville) (Entered: 01/27/2006)
01/27/2006	19	USCA ORDER IN LIEU OF MANDATE as to 14 Notice of Appeal, filed by CLARENCE E HILL. Appellant's application for stay of execution pending appeal is DENIED. (cda, Gainesville) (Entered: 01/27/2006)
02/02/2006	20	USCA Case Number 06-10621-P for 14 NOTICE OF APPEAL as to 7 Order by CLARENCE E HILL. (cda, Gainesville) (Entered: 02/03/2006)
02/02/2006	21	ACKNOWLEDGEMENT re 17 USDC LETTER Transmitting 16 ORDER denying 9 Certificate of Appealability, denying as moot 10 Motion to Appoint Counsel, and denying 11 Motion for Leave to Appeal in forma pauperis. Received by USCA on 1/26/2006. USCA #06-10621-P. (cda, Gainesville) (Entered: 02/03/2006)

Date Filed	#	Docket Text
02/14/2006	22	USCA ORDER #06-10621-P granting appellant's motion for leave to proceed on appeal in forma pauperis. (atm, Gainesville) (Entered: 02/17/2006)

-- F.3d --, 2006 WL 163607 (C.A.11 (Fla.)),
19 Fla. L. Weekly Fed. C 203

United States Court of Appeals, Eleventh Circuit.

Clarence E. HILL, Plaintiff-Appellant,
v.
James V. CROSBY, Jr., Charlie Crist, Defendants-Appellees.
No. 06-10621.

Jan. 24, 2006.

Before EDMONDSON, Chief Judge, and TJOFLAT and PRYOR, Circuit Judges.

BY THE COURT:
Appellant Clarence Edward Hill has been convicted of capital murder in Florida and sentenced to death. His execution is scheduled for today, January 24, 2006, at 6:00 p.m. On January 20, 2006, he applied to this court for leave to file a second and successive habeas petition in an effort to forestall his execution. We denied his application in an order entered earlier today. At the same time, we denied his application under 28 U.S.C. §§ 1651 and 2251 for a stay of his execution.

Also on January 20, 2006, appellant brought this suit for declaratory and injunctive relief under 42 U.S.C. § 1983, in the United States District Court for the Northern District of Florida. He contends that death by lethal injection causes pain and unnecessary suffering and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. He seeks a permanent injunction barring his execution. On January 21, 2006, the district court issued an order dismissing appellant's complaint on the ground that the complaint "is the 'functional equivalent' of a successive

habeas petition," and that the court lacked jurisdiction to entertain it in the absence of an order from the court of appeals granting appellant leave to file a successive petition.

The district court relied on as authority for its ruling our decision in *Robinson v. Crosby,* 358 F.3d 1281 (11th Cir. 2004), which, as the district court properly observed, dealt with "the very issue" appellant's complaint presents here. Appellant now appeals the district court's order, and he asks that we stay his execution pending our disposition of his appeal.

It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it. *See* 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in *Robinson,* "such an application to file a successive petition would be due to be denied in any event. *See In re Provenzano,* 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied,* 530 U.S. 1256, 120 S. Ct. 2710, 147 L. Ed. 2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

For this reason, we DENY appellant's application for a stay of his execution pending appeal.

SO ORDERED.

Slip Copy, 2006 WL 167585 (N.D. Fla.), 19 Fla. L. Weekly Fed. D 205

United States District Court, N.D. Florida.
Clarence HILL. Plaintiff,
v.
James CROSBY, Secretary of the Florida Department of Corrections, in his official capacity; and Charles Crist, Jr., Attorney General, in his official capacity, Defendants.
No. 4:06-CV-032-SPM.

Jan. 21, 2006.

D. Todd Doss, Hunt & Doss, Lake City, FL, for Plaintiff.
Carolyn M. Snurkowski, Attorney General State of Florida, Tallahassee, FL, for Defendants.

ORDER DISMISSING COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

MICKLE, J.

THIS CAUSE comes before the Court upon the "Verified Complaint for Declaratory & Injunctive Relief" (doc. 2) and all accompanying attachments and appendices filed by Plaintiff through counsel on January 20, 2006, and the response from the Attorney General (doc. 6) also filed January 21, 2006. For the following reasons, the Court finds that the motion must be dismissed for lack of jurisdiction.

This case has a long history dating back to Plaintiff's original death sentence in May of 1983. The procedural history is set out in the Florida Supreme Court's opinion of January 17, 2006, *Hill v. State*, 2006 WL 913[illegible] (Fla. Jan. 17, 2006),

demonstrating that Plaintiff has filed previous petitions for habeas corpus, both in the federal and state courts. *See, e.g., Hill v. Dugger,* 556 So. 2d 1385 (Fla. 1990); *Hill v. Moore,* 175 F.3d 915 (11th Cir. 1999); *Hill v. Butterworth,* 941 F. Supp. 1129 (N.D. Fla. 1996).

Plaintiff now brings the instant suit as a motion for declaratory and injunctive relief under 42 U.S.C. § 1983 for alleged prospective violations of his right to be free from cruel and unusual punishment (doc. 2-1 at 2), claiming that death by lethal injection causes pain and unnecessary suffering. In support of his claim, Plaintiff points to "newly-discovered evidence" in the form of an article from the medical journal *The Lancet,* which purportedly found that inmates (in the cases studied by the researchers) had felt pain during their executions due to insufficient amounts of anesthetic in their bloodstream. Plaintiff seeks a permanent injunction barring the execution of his death sentence.

This very issue was dealt with by the Eleventh Circuit in *Robinson v. Crosby,* 358 F.3d 1281 (11th Cir. 2004). In *Robinson,* the appellant filed a § 1983 action in the Middle District of Florida alleging that "lethal injection causes those who are executed pain and suffering while they are paralyzed and unable to communicate." *Id.* at 1282. The district court dismissed the petition for lack of jurisdiction, holding that the appellant's § 1983 action was the functional equivalent of a successive habeas corpus petition, which would subject him to the authorization requirements of 28 U.S.C. § 2244. Absent the permission of the Eleventh Circuit, the appellant was not authorized to file a successive petition, and thus the district court lacked jurisdiction to consider it. *Id.* at 1283-84.

The Eleventh Circuit explicitly upheld the district court's finding:

> We conclude that the district court correctly dismissed Robinson's § 1983 complaint for lack of jurisdiction. A § 1983 claim seeking relief-including a TRO, preliminary injunction, or a stay of execution-from a sentence of death as cruel and unusual punishment is the "functional equivalent" of a successive habeas petition. The district court lacked jurisdiction to consider Robinson's claim because he failed to apply to this Court for permission to file a successive habeas petition. We further note that such an application to file a successive habeas petition would be due to be denied in any event. *See* In re *Provenzano,* 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied,* 530 U.S. 1256, 120 S. Ct. 2710, 147 L. Ed. 2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B)).

Id. at 1284 (remaining internal citations omitted). Plaintiff's claim, like that of the appellant in *Robinson,* is virtually identical to those raised in other cases in which stays of execution have been denied. *Id.* at 1283 (*citing* In re *Roe,* 540 U.S. 1171 (2004); *Vickers v. Johnson,* 540 U.S. 1170, 124 S. Ct. 1196, 157 L. Ed. 2d 1224 (2004); *Zimmerman v. Johnson,* 540 U.S. 1087, 124 S. Ct. 979, 157 L. Ed. 2d 792 (2003); *and Beck v. Rowsey,* 540 U.S. 1098, 124 S. Ct. 980, 157 L. Ed. 2d 811 (2004) (Supreme Court vacated stay entered by district court)).

Plaintiff's claim of "newly-discovered evidence" is insufficient to overcome the procedural bar in this case. Plaintiff cites the *Lancet* article as conclusive proof that inmates do feel pain during the lethal injection procedure. He details the injection process, noting that sodium pentothal is

first administered as an anesthetic, followed by pancuronium bromide, a paralytic agent which prevents the inmate from moving or otherwise showing pain or discomfort. The final chemical to be injected is potassium chloride, which causes the actual death by stopping all movement of the heart and suffocating the inmate. The *Lancet* researchers found that toxicology reports in their case studies demonstrated that insufficient amounts of anesthetic were injected, permitting the inmates to experience the feelings of being suffocated and having a heart attack, yet remaining paralyzed by the pancuronium. While Florida's procedure was not examined in the study, Plaintiff argues that Florida's practice is "substantially similar" and thus poses the same risk to inmates.

These exact issues were raised and disposed of in *Robinson,* in which the Eleventh Circuit referred to affidavits filed in that case addressing "the effects of the drugs used during lethal injection, how they each cause pain and suffering, and particularly how the pancuronium bromide chemical paralyzes the person and masks the pain and suffering being incurred." *Id.* at 1285 n.4. An additional affidavit "discusse[d] how the level of potassium chloride being used in the lethal injection context may not cause actual cardiac arrest but may result in death by suffocation due to lack of oxygen." *Id.*

While the *Lancet* article itself may be new, having just been published last year, the factual basis of Plaintiff's claim has certainly been raised and disposed of in numerous cases, both in Florida and in other states. Plaintiff has made no showing that he could not have discovered these underlying predicates through the exercise of due diligence. *See* in re *Provenzano,*

215 F.3d 1233, 1236-37 (11th Cir. 2000).[1]

Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. *Robinson*, 358 F.3d at 1284. As such, he should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition.

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's complaint/motion for declaratory and injunctive relief (doc. 2) is hereby *dismissed* for lack of jurisdiction. No stay of execution shall issue in this case.

DONE AND ORDERED.

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[1] The Supreme Court of Florida also noted in its opinion that

> [a]cross the nation, courts have rejected claims that *The Lancet* study requires a new evaluation of the constitutionality of lethal injection. *See Brown v. Crawford*, 408 F.3d 1027 (8th Cir.2005) (dismissing an appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S.C. § 1983 in part on The Lancet study at issue here); *Bieghler v. State*, 839 N.E.2d 691 (Ind. 2005) (finding The Lancet study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution").

2006 WL at *6.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

CLARENCE EDWARD HILL, Plaintiff, v. JAMES V. CROSBY, SECRETARYOF THE FLORIDA DEPARTMENT CORRECTIONS, in his official capacity; CHARLES J. CRIST, JR., ATTORNEY GENERAL, in his official capacity, Defendants.	)	**This is a capital case.** **EXECUTION SCHEDULED FOR JANUARY 20, 2006 at 6:00 p.m.** CIVIL ACTION NO: 4:06-cv-00032-SPM **EXPEDITED HEARING REQUESTED**

VERIFIED COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF

I.

Nature of Action

1. This action is brought pursuant to 42 U.S.C. § 1983 for violations and threatened violations of the right of Plaintiff to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff seeks equitable and injunctive relief.

II.

Plaintiff

2. Clarence Hill is a United States citizen and a resident of the State of Florida. He is currently a death-sentenced inmate under the supervision of the Florida Department of Corrections. His DC Number is 089718. He is held in the Florida State Prison, Starke, Florida, 32091.

III.

Defendants

3. Defendant James V. Crosby is the Secretary of the Florida Department of Corrections. Defendant Charles J. Crist, Jr., is the Attorney General for the State of Florida.

IV.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 1651 (all-writs) 2201 (declaratory relief), 2202 (further relief). This action arises under the Eighth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983.

5. Venue in this Court is proper under 28 U.S.C. § 1391. This Court has personal jurisdiction over the defendants in this matter, because the defendants are located in the Northern District of Florida.

V.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

6. Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy. The cruel irony is the issue is mooted

once the violation occurs and Mr. Hill is dead. Mr. Hill has exhausted his state and federal court remedies via appeals and habeas petitions. Mr. Hill currently has a petition for certiorari pending before the U.S. Supreme Court in his capital case and one of the issues is the constitutionality of Florida's lethal injection procedure[1]. See Attachment A. Therefore, Mr. Hill has exhausted all avenues of relief and turns to this Court for protection of his constitutional right to be free from cruel and unusual punishment.

VI.

Facts

7. Plaintiff Clarence Hill is scheduled for execution on January 24, 2006, at 6:00 p.m. Defendants plan to execute the Plaintiff by lethal injection using a succession of three chemicals: sodium pentothal, pancuronium bromide, and potassium chloride.

8. As set forth in greater detail in the declaration of anesthesiologist, Dr. David A. Lubarsky (Attachment B), the use of this succession of chemicals creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

9. Specifically, sodium pentothal, also known as thiopental, is an ultra-short acting substance which produces shallow anesthesia. (Att. B). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the to patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium

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[1] The procedural history of the appeals and habeas petitions filed by Mr. Hill are detailed in Attachment C and adopted as if expressly stated herein.

pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

10. The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Att. B). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Att. B).

11. The American Veterinary Medical Association (AVMA) panel on euthanasia specifically prohibits the use of pentobarbital with a neuromuscular blocking agent to kill animals. (Att. C). Additionally, 19 states have expressly or implicitly prohibited the use of neuromuscular blocking agents in animal euthanasia because of the risk of unrecognized consciousness. (Att. C).

12. The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Att. B). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (Att. B).

13. In a recent study published in 2005, Dr. David A. Lubarsky and three co-authors published in the world-renowned medical journal THE LANCET the results of their research on the effects of chemicals in lethal injections.[2] See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., *Inadequate anaesthesia in lethal injection for execution*, Vol 365, THE LANCET 1412-14 (April 16, 2005)(Att. C).

14. The LANCET team found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Att. C). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

15. The chemical process utilized in executions in Florida is identical to that identified in the study:

> In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty milligrams of pancuronium bromide,

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[2] The study focused on several states which conducted autopsies and prepared toxicology reports, and which made such data available to these scholars. (Att. B).

> which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating.

Sims v. State, 754 So. 2d 657, 666 (Fla. 2000).[3]

16. As stated by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Att. B).

VI.

Claim

17. Plaintiff incorporates paragraphs 1-15 by reference.

18. James V. Crosby, Secretary of the Florida Department of Corrections and Charles J. Crist, Jr., Attorney General, are acting under color of Florida law by using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment, in violation of 42 U.S.C. § 1983.

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[3] While Mr. Hill requested updated information from the defendants, such request was refused. Thus, at the present time, Mr. Hill can only assume that the Florida Department of Corrections has not changed this chemical process since the *Sims* opinion.

VII.

Prayer for Relief

19. Plaintiff requests that this Court issue a preliminary injunction, prohibiting defendants from executing Plaintiff until this Court has had the opportunity to fully consider this complaint without haste.

20. Plaintiff requests that this Court grant a permanent injunction, barring defendants from executing Plaintiff in the manner they currently intend.

21. Plaintiff requests that this Court grant reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States, as well as for costs of suit and any further relief that this Court deems just and proper.

This 20th day of January 2006.

Respectfully submitted,

/s/

D. Todd Doss
Florida Bar 0910384
725 S.E. Baya Drive, Suite 102
Lake City, FL 32025
Telephone No. 352-359-3972
Attorney for Plaintiff

VERIFICATION

State of Florida
County of Leon

I, D. Todd Doss, attorney for Plaintiff in the above-entitled action, being duly sworn, state that to the best of my knowledge and belief, the facts sets for in this Complaint are true and correct.

/s/
D. Todd Doss
Florida Bar 0910384
725 S.E. Baya Drive, Suite 102
Lake City, FL 32025
Telephone No. 352-359-3972
Attorney for Plaintiff

Subscribed to and sworn before me this 20th day of January 2006

/s/
Notary public, State of Florida
Commission expires:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CLARENCE EDWARD HILL,	)	
	)	
Petitioner,	)	
	)	CASE NO. 4:06cv32-SPM
	)	
JAMES V. CROSBY, JR., Secretary, Florida Dept. of Corrections, et al., in his official capacity,	)	
	)	
Respondent.	)	
	)	

RESPONSE TO REQUEST FOR PERMANENT INJUNCTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

COMES NOW Respondent, by and through undersigned counsel, and responds to Hill's request for permanent injunction included in his Verified Complaint for Declaratory and Injunctive Relief filed as an action pursuant to 42 U.S.C. § 1983, and motion to dismiss for failure to state a cause of action, and would show:

1. Clarence Edward Hill (DC No. 089718), is a Florida death-row inmate housed at Florida State Prison, Starke, Florida, sentenced to death for the 1982 first degree capital murder of Officer Stephen Taylor. **Florida Governor, Jeb Bush, signed a new death warrant on November 28, 2005,**

setting the warrant week to run from noon, Monday, January 23, 2006, through noon, Monday January 30, 2006, with Hill's execution set for Tuesday, January 24, 2006, at 6:00 P.M.

2. Hill seeks extraordinary review of this "expedited" action brought pursuant to 42 U.S.C. § 1983, asserting that he is entitled to permanent injunctive relief because defendants will use a succession of "three chemicals that will cause unnecessary pain in the execution of sentence of death".

3. As an initial point, Hill has not identified what administrative remedies he claims he has exhausted, albeit he protests he has exhausted "all avenues". *Nelson v. Campbell*, 541 U.S. 637, 643 (2004), clearly contends that Section 1983 "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *See* 42 U.S.C. § 1997e(a).

Moreover, the very language he uses to answer the "V. Exhaustion of Administrative Remedies", reflects that he is merely attempting to get around successive federal habeas corpus hurdles in his declaration that "Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." In fact, in his successive postconviction trek in state court he identified the last 16 executions by lethal injection in Florida as possible sources of information to "perfect" his arguments.

In this instance, Hill has **proven** the caveat set forth by the Court in *Nelson*, *supra* , that his claims are based on speculation and do not state a cause of action upon which relief may be granted:

> Finally, the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1) [18 USCS § 3626(a)(1)]; accord, § 3626(a)(2). **It requires that inmates exhaust available state administrative remedies before bringing a ' 1983 action challenging the conditions of their confinement.** 110 Stat 1321-71, 42 U.S.C. § 1997e(a) [42 USCS § 1997e(a)] ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"). **The Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted**, or seeks monetary relief from a defendant who is immune from relief." § 1997e(c)(1). Indeed, if the claim is frivolous on its face, a district court may dismiss the suit before the plaintiff has exhausted his state remedies. § 1997e(c)(2).

Nelson, 541 U.S. 649 (Emphasis added).

4. Hill clearly seeks to circumvent federal habeas corpus review under 28 U.S.C. § 2244 by filing this action, the sole

purpose of which is to stop any execution. As observed in *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (emphasis added),

> A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself--by simply altering its method of execution, the State can go forward with the sentence. *Cf. Weaver v. Graham*, 450 U.S. 24, 32-33, n.17, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981) (no ex post facto violation to change method of execution to more humane method). **On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. *See Calderon v. Thompson*, 523 U.S. 538, 556-557, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); *In re Blodgett*, 502 U.S. 236, 238, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) (*per curiam*); *McCleskey v. Zant*, 499 U.S. 467, 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) ("[T]he power of a**

State to pass laws means little if the State cannot enforce them").

Unlike Nelson, Hill is not questioning whether a particular procedure, personal to him,[1] is unnecessary to complete his execution. Rather Hill points to a recent research paper published in THE LANCET, which "hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. *See* Koniaris et al., supra. at 1413. The study ultimately concludes that 'public review of lethal injection is warranted.' *Id.* at 1414." *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Specifically, the "letters" provide in conclusion:

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review

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[1] In *Nelson*, 541 U. S. at 646, the Court observed: "If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. **But petitioner has been careful** throughout these proceedings, **in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled.** App. 17 (complaint) (proffering as "less invasive, less painful, faster, cheaper, and safer" the alternative procedure of "percutaneous central line placement"); id., at 37-38 (affidavit of Dr. Mark Heath) (describing relative merits of the cut-down and percutaneous central line placement). No Alabama statute requires use of the cut-down, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.

> **might have** led to the unnecessary suffering of at least **some** of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia **cannot be certain. Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted."**

Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412, 1414 (2005) (Emphasis added).

In denying a stay of execution in a Missouri capital case, wherein Brown brought an identical 42 U.S.C. § 1983 action, the Eighth Circuit rejected Dr. Lubarsky's THE LANCET paper, *Brown v. Crawford*, 408 F.3d 1027 (8th Cir. May 17, 2005), *cert. denied Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005). In his dissent, Circuit Judge Bye states that the issue in *Brown*, "challenges the chemical protocol used by Missouri to carry out lethal injections. He contends the three-chemical sequence used by Missouri - sodium pentothal, pancuronium bromide, and potassium chloride - creates a foreseeable risk of the gratuitous infliction of unnecessary pain and suffering in violation of the Eighth Amendment."[2]

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[2] The dissent also succinctly reports what the specific issue was in *Brown*,

> "Brown's § 1983 action is based in part upon a recently-published article. See L.G. Koniaris, M.D., Inadequate anaesthesia in lethal injection for execution, 365 The Lancet 1412 (Apr. 16, 2005). This article appears to be the first published empirical research showing the three-chemical process used by some states to carry out lethal injections has the possibility of causing unnecessary cruelty and suffering. The study outlined in the article analyzed autopsy toxicology results from forty-nine executions carried out in Arizona, Georgia, North Carolina and South Carolina. The authors conclude in

5. Hill raised, as part of his December 15, 2005 successive state court postconviction litigation, the issue of whether "new evidence" has come to light based on "research letters" published in THE LANCET, that evidenced empirical data that execution by lethal injection might be flawed. The state trial court and Florida Supreme Court rejected the very argument made herein in this action. *See Hill v State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006):

> Hill's claim is that a research letter published in April 2005 in *The Lancet* presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. *See* Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 *Lancet* 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided *Sims v. State*, 754 So. 2d 657 (Fla. 2000). The trial court denied this claim. We agree.
>
> In *Sims*, we held that "the procedures for administering the lethal injection [in Florida] do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. This 2005 study, as found by the trial court, does not sufficiently call into question our holding in *Sims*.

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twenty-one of those cases - or 43% - the post-mortem levels of thiopental (sodium pentothal) were consistent with consciousness. In other words, the deceased was likely conscious when the potassium chloride was administered."

This study applies toxicology data in autopsy reports obtained from Arizona, Georgia, North Carolina, and South Carolina to the protocols used by Texas and Virginia. n2 No toxicology data from Florida was used. Indeed, the study recognizes that the two grams of sodium pentothal administered during lethal injection in Florida is "a relatively large quantity [when] compared with the typical clinical induction dose of 3-5 mg/kg." Koniaris et al., supra, at 1412. n3 Nonetheless, from the autopsy data obtained in these other states, the study hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. See Koniaris et al., supra, at 1413. The study ultimately concludes that "public review of lethal injections is warranted." *Id.* at 1414.

n2 The study relies on the autopsy toxicology results obtained from these four states because, according to the authors, they could not obtain this data from Texas or Virginia. Koniaris et al., supra at 1412-13. There is no allegation that either the protocol or autopsy data from Florida was not available to the authors.

n3 In *Sims*, we detailed the procedure for carrying out lethal injection in Florida. 754 So. 2d at 665 n.17. This included a requirement that inmates be injected with "'no less than' two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious." Id. The defense expert agreed that this amount of sodium pentothal was a "lethal dose and certain to cause rapid loss of consciousness." *Id.* at 666 n.17.

This study does not justify an evidentiary hearing in this case. Fla. R. Crim. P. 3.852(i); *see also* Fla. R.

Crim. P. 3.851(f)(5)(A). Under Florida Rule of Criminal Procedure 3.851(f)(5)(B), a trial court may deny a request for an evidentiary hearing when "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So. 2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in Sims, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. Id. at 668. Therefore, we affirm the trial court's denial of this claim without an evidentiary hearing. n5

n4 In Sims, we recognized that Florida's procedures address some of the reasons given in the study for finding that two grams of anesthesia "may be overly simplistic." The study attributes its results, in part, to the lack of medical training in the personnel and the inmate's high level of anxiety immediately before the execution. Koniaris et al., supra, at 1412. In Florida, both a doctor and a physician's assistant are present during the execution, and the inmate is provided with a Valium before the execution "if necessary to calm anxiety." *Sims*, 754 So. 2d 657.

> n5 Across the nation, courts have rejected claims that *The Lancet* study requires a new evaluation of the constitutionality of lethal injection. *See Brown v. Crawford*, 408 F.3d 1027 (8th Cir. 2005) (dismissing an appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S.C. '1983 in part on *The Lancet* study at issue here); *Bieghler v. State*, No. 2005 Ind. LEXIS 1156, 34S00-0511-SD-679, 2005 WL 3549175 (Ind. Dec. 28, 2005) (finding The Lancet study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution").

See also recent rejections of identical claims by the United States Supreme Court in other case under warrant challenging claims as found in *Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005), and *Donald Jones v. Purkett*, 04A-912 (April 26, 2004); *Hicks v. Taft*, 05A-487 (November 29, 2005); *Johnston v. Roper*, 05A-206 (August 30, 2005).

7. Terminally, as observed by the Court in Nelson, 541 U.S. at 649-50:

> Moreover, as our previous decision in *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992) (*per curiam*), makes clear, the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right. *Gomez* came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute § 1983 action challenging the constitutionality of California's use of

the gas chamber. We left open the question whether the inmate's claim was cognizable under § 1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*, at 654, 118 L. Ed. 2d 293, 112 S. Ct. 1652.

A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Ibid.* Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, *see Blodgett*, 502 U.S., at 239, 116 L. Ed. 2d 669, 112 S. Ct. 674; *McCleskey*, 499 U.S., at 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

See also *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (equitable relief not warranted where delay in bringing action

challenging method of execution post-*Nelson*); *White v. Johnson*, 429 F.3d 572 (5th Cir. 2005) (same).

In the instant case Hill's "action" should be dismissed and, even assuming *arguendo*,that he has somehow met the *Nelson, supra*, test setting forth an independent '1983 action, no stay can obtain.

CONCLUSION

Based on the foregoing, all requested relief should be denied in all respects.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 06-10621-P

CLARENCE EDWARD HILL,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
JAMES V. CROSBY,	)	
SECRETARY OF THE	)	EMERGENCY
FLORIDA DEPARTMENT OF	)	APPLICATION:
CORRECTIONS, in his	)	CAPITAL CASE,
official capacity;	)	DEATH WARRANT
and	)	SIGNED;
	)	EXECUTION
CHARLES J. CRIST, JR.,	)	IMMINENT
ATTORNEY GENERAL, in his	)	
official capacity	)	
	)	
Appellees.	)	
	)	

APPLICATION FOR A STAY OF EXECUTION AND FOR EXPEDITED APPEAL

COMES now the Appellant, CLARENCE HILL, through undersigned counsel and respectfully moves for a stay of execution and an expedited appeal. Mr. Hill's execution is presently scheduled for January 24, 2006 at 6:00 p.m.

I. PROCEDURAL HISTORY

Appellant, Clarence Hill, was convicted of first degree murder in 1983. On appeal, his conviction was affirmed, but his sentence was vacated. Following a second sentencing proceeding, Mr. Hill was again sentenced to death, and the Florida Supreme Court affirmed. *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied, Hill v. State,* 108 S. Ct. 1302 (1988).

On November 9, 1989, the Governor of Florida signed a death warrant scheduling Mr. Hill's execution for January 25, 1990.

Mr. Hill filed an expedited postconviction motion, which was denied on January 18, 1990. On appeal, the Florida Supreme Court denied relief. *Hill v. State*, 556 So. 2d 1385 (Fla. 1990).

Mr. Hill subsequently filed a Motion to Stay Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida on January 27, 1990. After granting a stay of execution, on August 31, 1992, the district court granted relief to Mr. Hill on a sentencing issue.

On remand, the Florida Supreme Court again denied relief. *Hill v. State*, 643 So. 2d 1071 (Fla. 1995). Mr. Hill's subsequent state and federal applications, including his federal Petition for Writ of Habeas Corpus, were unsuccessful. *See Hill v. Moore*, 175 F.3d 915 (11th Cir. 1999), *Hill v. State*, 528 U.S. 1087 (2000), *Hill v. State*, 2006 Fla. LEXIS 8 (January 17, 2006). On Friday, January 20, 2006, Mr. Hill brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court, Northern District of Florida, Tallahassee Division. Mr. Hill alleged violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States

Constitution. On Saturday, January 21, 2006, the district court dismissed Mr. Hill's complaint for declaratory and injunctive relief for lack of jurisdiction. Thereafter, on Monday, January 23, 2006, Mr. Hill filed a Notice of Appeal.

II. BASIS FOR STAY OF EXECUTION

This Court utilizes a four part test in determining whether a stay of execution should be granted:

> whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest.

Bundy v. Wainwright, 808 F. 2d 1410, 1421 (11th Cir. 1987). Mr. Hill has met the standards attendant to the granting of a stay of his execution. Each of the criteria is satisfied in this case:

A. IRREPARABLE INJURY

If no stay of execution is granted, Mr. Hill will be executed by lethal injection at the Florida State Prison on Tuesday, January 24, 2006, at 6:00 p.m. This constitutes irreparable injury. *See, e.g., Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice, granting a stay of execution and noting the "obviously irreversible nature of the death penalty"); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (the "irreversible nature of the death penalty" constitutes irreparable injury and weighs heavily in favor of granting a stay).

B. HARM TO OTHER PARTIES

There will be no harm to other parties if a stay of execution is granted. Mr. Hill will remain in the custody of the State in Florida State Prison, where he has been held

since his conviction. A relatively brief continuation of the *status quo* will cause absolutely no harm to other parties.

C. PUBLIC INTEREST

Although there are competing public interests, ultimately one factor favors the issuance of the temporary relief sought. Certainly, the public has an interest in having the execution of Mr. Hill pursuant to the judgment of the Florida Courts. More importantly, however, it has an interest in having no execution take place until it is determined that Mr. Hill's execution will be carried out consistent the with requirements of the Eighth Amendment. The temporary delay in carrying out the execution, which will be necessitated by review and consideration of the merits of Mr. Hill's case, is a small price to pay to assure fairness in this critical aspect of carrying out Mr. Hill's sentence.

D. THE LIKELIHOOD THAT MR. HILL WILL PREVAIL ON THE MERITS

The likelihood that Mr. Hill will prevail on the merits of his claims is demonstrated by the fact that there is now empirical, scientific evidence establishing that the chemical process for lethal injection utilized in accordance with the Florida Department of Correction's protocol, creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

A recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Hill's Complaint) and three co-authors detailed the results of their research on the effects of chemicals in lethal injections. See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., *Inadequate anaesthesia in lethal injection for execution*, Vol 365, THE

LANCET 1412-14 (April 16, 2005).[1] This study confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.[2] The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Complaint, Att. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.[3]

As explained in the declaration of Dr. Lubarsky, sodium pentothal is an ultra-short acting substance which produces shallow anesthesia. (Complaint, Att. A). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the to patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause

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[1] Mr Hill has not delayed unnecessarily in bringing his Complaint. This study was published in 2005 and to Mr. Hill's knowledge, it constitutes the first empirical research published regarding lethal injection, thus making it unique.

[2] Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty. (Complaint, Att. A).

[3] As noted in Mr. Hill's 1983 action, the chemical process utilized in executions in Florida is identical to that identified in the study.

pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Complaint, Att. A). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Complaint, Att. A).

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Complaint, Att. A). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his arms, and his entire body so that he cannot express himself either verbally or otherwise. (Complaint, Att. A).

As explained by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will

not be anesthetized at the time of his death. (Complaint, Att. A).

Here, the appellees are acting under color of Florida law by using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

The Eighth Amendment "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It prohibits the risk of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," *Id.* at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. *Id.* at 370 (emphasis added).

Under the present circumstances, given the fact that Mr. Hill possesses scientific evidence proving his claim, he will likely succeed on the merits of the issue; that is, he will be unnecessarily subjected to a substantial risk of wanton infliction of pain, in violation of the Eighth Amendment.

III. MR. HILL'S CHALLENGE TO THE CHEMICALS TO BE UTILIZED IN HIS EXECUTION WAS PROPERLY BROUGHT IN A § 1983 ACTION

In dismissing Mr. Hill's complaint for lack of jurisdiction, the district court stated:

> Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. *Robinson*, 358 F.3d at 1284. As such, he should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition.

Order at 5.

Mr. Hill recognizes that this Court, in *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004), concluded "that the district court correctly dismissed Robinson's *§ 1983* complaint for lack of jurisdiction" as a challenge to lethal injection because it is the "'functional equivalent' of a successive habeas petition." However, Mr. Hill asserts that in light of the United States Supreme Court case in *Nelson v. Campbell*, 541 U.S. 637 (2004), which was subsequent to this Court's opinion in *Robinson*, the district court's order was erroneous.

In *Nelson*, the United States Supreme Court stated:

> We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution — *e.g.*, lethal injection or electrocution — fall within the core of federal

habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the "conditions" nor the "fact or duration" label is particularly apt. A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence. Cf. *Weaver* v. *Graham*, 450 U.S. 24, 32-33, n.17 (1981) (no *ex post facto* violation to change method of execution to more humane method). On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see Ala. Code § 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. See *Calderon* v. *Thompson*, 523 U.S. 538, 556-557 (1998); *In re Blodgett*, 502 U.S. 236, 238 (1992) *(per curiam); McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Nelson, 541 U.S. at 643-4 (emphasis added).

The Court concluded that it "need not reach here the difficult question of how to categorize method-of-execution claims generally." *Id.* at 644. Rather, in the specific case of a cut-down procedure, the Court stated:

> Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. Tr. of Oral Arg. 40 ("I don't disagree . . . that a cut-down occurring for purposes of venous access, wholly divorced from an execution, is indeed a valid conditions of confinement claim"); see also *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (citation omitted)). We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

Id. at 644-5.

Subsequent to *Nelson*, the Fourth Circuit Court of Appeals determined that where the Petitioner does not assert that lethal injection generally is an unconstitutional method of execution, but rather that the particular protocol the State plans to use is impermissible, this constitutes a cognizable claim under § 1983. *Reid v. Johnson*, 2004 U.S. App. LEXIS 15855, *6 (2004), stay vacated by *Johnson v. Reid*, 2004 U.S. LEXIS 4856 (2004) ("In light of *Nelson*, we conclude that Reid has stated a cognizable claim under *§ 1983*. Like Nelson, Reid does not assert that lethal injection generally is

an unconstitutional method of execution. Rather, he asserts only that the particular protocol the State plans to use is impermissible; he acknowledges that other protocols would pass constitutional muster.").[4]

As in *Nelson*, Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution.[5] Rather, he is "seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the 'fact' or 'validity' of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence." *Nelson*, 541 U.S. at 693-4. Here, it is the succession of chemicals to be utilized, in accordance with the Department of Correction's protocol, which creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed. As such, Mr. Hill's claim is a cognizable one under § 1983.

IV. CONCLUSION

For the foregoing reasons, Mr. Hill respectfully requests that this Court grant his Application For a Stay of Execution and for Expedited Appeal.

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[4] There appears to be some distinctions in the rulings of the various circuits as to this issue. For example, the Ninth Circuit Court of Appeals has determined that a § 1983 action is a proper vehicle by which to challenge a method of execution. *Beardslee v. Woodford*, 395 F.3d 1064, 1068 (9th Cir. 2005). Meanwhile, the Fifth Circuit Court of Appeals has yet to determine whether a challenge to a particular protocol properly states a claim under *§ 1983*, instead disposing of such claims on other grounds. See, e.g., *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004).

[5] "[A] constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." *Nelson*, 541 U.S. at 693-4.

Respectfully submitted,

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No. 06-10621-P
(Capital Case-Active Warrant-Execution Set For January 24, 2006, at 6:00 P.M.)

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CLARENCE EDWARD HILL,
Appellant,

vs.

JAMES V. CROSBY, JR., Secretary
Florida Department of Corrections, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida
The Honorable Stephan P, Mickle, District Court Judge

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE STATEMENT

Following, pursuant to Rule 26.1 of the Eleventh Circuit Rules of Appellate Procedure, are those parties and individuals interested for purposes of this appeal:

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Charles J. Crist, Jr.	Florida Attorney General
James V. Crosby, Jr.	Secretary, Florida Department of Corrections
Carolyn M. Snurkowski	Assistant Deputy Attorney General, Counsel for Appellee
Stephan P. Mickle	U.S. District Court Judge, Northern District of FL
Clarence Edward Hill	Appellant

Family of the deceased murder victim, Officer Stephen Taylor

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

This appeal follows the order of the United States District Court, Northern District, dated January 21, 2006, dismissing Hill's action brought pursuant to 42 U.S.C. § 1983. No oral argument is necessary to resolve the sole issue presented as to the validity of Florida's method of execution--lethal injection.

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STATEMENT OF JURISDICTION

Appellant, a state prisoner under a sentence of death, filed his "Petition Under 42 U.S.C. § 1983 on January 20, 2006. The Appellee responded that same day and on January 21, 2006, the district court dismissed the action in an Order Dismissing Complaint For Declaratory and Injunctive Relief and denied any stay.

Hill filed his notice of appeal on January 23, 2006.

STATEMENT OF THE ISSUE

I. Whether the District Court erred in dismissing Hill's 42 U.S.C. § 1983, Action.

STATEMENT OF THE CASE

A. Warrant

Clarence Edward Hill (DC No. 089718),is a Florida death-row inmate housed at Florida State Prison, Starke, Florida, sentenced to death for the 1982 first-degree capital murder of Officer Stephen Taylor. **Florida Governor, Jeb Bush, signed a new death warrant on November 28, 2005, setting the warrant week to run from noon, Monday, January 23, 2006, through noon, Monday January 30, 2006, with Hill's execution set for Tuesday, January 24, 2006, at 6:00 P.M.**

B. Facts

On October 19, 1982, Clarence Hill and his accomplice, Cliff Jackson, stole a pistol and an automobile in Mobile, Alabama, which they later used to rob a savings and loan association in Pensacola. During the robbery, the police arrived, and Hill and Jackson fled the savings and loan building from different exits. The police immediately apprehended Jackson, who had exited through the front door. Hill, who had fled out the back door, approached two officers from behind as they attempted to handcuff Jackson. Hill shot the officers, killing one and wounding the other. Hill was convicted of first-degree murder, attempted first-degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony. The trial court sentenced Hill to death for the first-degree murder conviction and to consecutive life sentences for the attempted murder and robbery convictions. On appeal, the Florida Supreme Court affirmed all of Hill's convictions and sentences with the exception of the death sentence. The Court remanded the cause for a new sentencing hearing before a new jury because of error in the jury selection process. *Hill v. State*, 477 So. 2d 553 (Fla. 1985).

In the resentencing proceeding, a second jury recommended the death sentence by an eleven-to-one vote. The trial court reimposed the death sentence, finding five aggravating circumstances and one mitigating circumstance. The Florida Supreme Court affirmed the resentence, finding that four of the five aggravating circumstances were proven beyond a reasonable doubt and concluding that consideration of the erroneous aggravating circumstance, that the murder was committed in a cold, calculated, and premeditated manner, could not possibly have compromised the weighing process of either the jury or the judge. *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 99 L. Ed. 2d 512, 108 S. Ct. 1302 (1988).

C. Litigation As To Lethal Injection

On December 15, 2005, Hill filed the latest postconviction litigation in the trial court, raising six (6) claims. On December 23, 2005, the state trial court denied all relief. The Court found **Claims I (Lethal Injection)**, II (Mental Retardation), III (Mental Age per *Roper v. Simmons*), V (Shackling), and VI (Reconsideration of prior 3.850), procedurally barred; and Claim IV (Public Records) Hill's state request for records was satisfied or no colorable basis for postconviction relief was presented, based on the additional public records request outside Rule 3.852(h), Fla.R.Crim.P.

Rehearing was filed on December 30, 2005, and denied on January 3, 2006, by the trial court. Briefing occurred on January 3, 2006, oral argument was held January 11, 2006, and all relief was denied January 17, 2006, when the Florida Supreme Court found that Hill's claims were either procedurally barred or failed to raise a claim upon which relief was warranted. *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Hill filed a petition for writ of certiorari in the United States Supreme Court arguing that the Florida

courts were incorrect in their **conclusions as to the lethal injection issue** and the mental age under *Roper* issue.

The Florida Supreme Court held, in *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. January 17, 2006), that:

> Hill's claim is that a research letter published in April 2005 in *The Lancet* presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. *See* Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided *Sims v. State*, 754 So. 2d 657 (Fla. 2000). The trial court denied this claim. We agree.
>
> In *Sims*, we held that "the procedures for administering the lethal injection [in Florida] do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. This 2005 study, as found by the trial court, does not sufficiently call into question our holding in *Sims*. This study applies toxicology data in autopsy reports obtained from Arizona, Georgia, North Carolina, and South Carolina to the protocols used by Texas and Virginia. n2 No toxicology data from Florida was used. Indeed, the study recognizes that the two grams of sodium pentothal administered during lethal injection in Florida is "a relatively large quantity [when] compared with the typical clinical induction dose of 3-5 mg/kg." Koniaris, et al., *supra*, at 1412.

n3 Nonetheless, from the autopsy data obtained in these other states, the study hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. *See* Koniaris, et al., *supra*, at 1413. The study ultimately concludes that "public review of lethal injections is warranted." *Id.* at 1414.

> n2 The study relies on the autopsy toxicology results obtained from these four states because, according to the authors, they could not obtain this data from Texas or Virginia. Koniaris, et al., *supra* at 1412-13. There is no allegation that either the protocol or autopsy data from Florida was not available to the authors.
>
> n3 In *Sims*, we detailed the procedure for carrying out lethal injection in Florida. 754 So. 2d at 665 n.17. This included a requirement that inmates be injected with "'no less than' two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious." *Id.* The defense expert agreed that this amount of sodium pentothal was a "lethal dose and certain to cause rapid loss of consciousness." *Id.* at 666 n.17.

This study does not justify an evidentiary hearing in this case. Fla. R. Crim. P. 3.852(i); *see also* Fla. R. Crim. P. 3.851(f)(5)(A). Under Florida Rule of Criminal Procedure 3.851(f)(5)(B), a trial court may deny a request for an evidentiary hearing when "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." The trial court in this case correctly determined that this

study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So. 2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in *Sims*, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. *Id.* at 668. Therefore, we affirm the trial court's denial of this claim without an evidentiary hearing. n5

n4 In *Sims*, we recognized that Florida's procedures address some of the reasons given in the study for finding that two grams of anesthesia "may be overly simplistic." The study attributes its results, in part, to the lack of medical training in the personnel and the inmate's high level of anxiety immediately before the execution. Koniaris, et al., *supra*, at 1412. In Florida, both a doctor and a physician's assistant are present during the execution, and the inmate is provided with a Valium before the execution "if necessary to calm anxiety." *Sims*, 754 So. 2d 657.

n5 Across the nation, courts have rejected claims that *The Lancet* study requires a new evaluation of the constitutionality of lethal injection. *See Brown v. Crawford*, 408 F.3d 1027 (8th Cir. 2005) (dismissing an

appellant's motion for a stay of execution despite the fact that the appellant based his claim under 42 U.S.C. § 1983 in part on *The Lancet* study at issue here); *Bieghler v. State*, No. 2005 Ind. LEXIS 1156, 34S00-0511-SD-679, 2005 WL 3549175 (Ind. Dec. 28, 2005) (finding *The Lancet* study was not sufficient to establish "a reasonable probability that Indiana's method of execution violates the federal or state constitution").

D. Standard of Review

This Court's standard for review is de novo.

SUMMARY OF THE ARGUMENT

Hill's 42 U.S.C. §1983, action was properly dismissed by the federal district court because "Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus." Indeed, the instant attack on the method of execution is based on the "identical evidence" that he sought postconviction relief in the trial and appellate courts of Florida.

ARGUMENT

I. The District Court did not err in dismissing Hill's 42 U.S.C. § 1983, Action.

Hill seeks extraordinary appellate review of the denial of this "expedited" action brought pursuant to 42 U.S.C. § 1983, in the federal district court asserting that he is entitled to further relief because Appellee will use a succession of "three chemicals that will cause unnecessary pain in the execution of sentence of death" on or about January 24, 2006.

Procedurally, Hill has not identified what administrative remedies he claims he has exhausted, albeit he protested below that he exhausted "all avenues". The United States

Supreme Court, in *Nelson v. Campbell*, 541 U.S. 637, 643 (2004), contemplated that § 1983 "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence." *See* 42 U.S.C. § 1997e(a).[1]

Hill has **proven** the "caveat" set forth by the Court in *Nelson*, *supra.*, that claims based on speculation **do not** state a cause of action upon which relief may be granted:

> Finally, the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1) [18 USCS § 3626(a)(1)]; accord, § 3626(a)(2). **It requires that inmates exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of their confinement.** 110 Stat 1321-71, 42 U.S.C. § 1997e(a) [42 USCS § 1997e(a)] ("No action shall be brought

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[1] The very language Hill used to answer the "V. Exhaustion of Administrative Remedies" below, reflects he was merely attempting to get around successive federal habeas corpus hurdles in his declaration that "Plaintiff has no administrative remedy available as the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." In Hill's successive postconviction, state court litigation, he identified the last 16 executions by lethal injection in Florida as possible sources of information to "perfect" this argument.

> with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"). **The Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted**, or seeks monetary relief from a defendant who is immune from relief." § 1997e(c)(1). Indeed, if the claim is frivolous on its face, a district court may dismiss the suit before the plaintiff has exhausted his state remedies. § 1997e(c)(2).

Nelson, 541 U.S. 649 (Emphasis added).

Hill clearly sought to circumvent federal habeas corpus review under 28 U.S.C. § 2244 by filing his §1983 action, the sole purpose of which was to stop any execution. As observed in *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (Emphasis added),

> A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself-by simply altering its method of execution, the State can go forward with the sentence. *Cf. Weaver v. Graham*, 450 U.S. 24, 32-33, n. 17, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981) (no ex post facto violation to change method of execution to more humane method). **On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, *see* Ala. Code**

§ 15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. *See Calderon v. Thompson*, 523 U.S. 538, 556-557, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998); *In re Blodgett*, 502 U.S. 236, 238, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) (*per curiam*); *McCleskey v. Zant*, 499 U.S. 467, 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

Unlike Nelson, Hill is not questioning whether a particular procedure personal to him,[2] is unnecessary to

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[2] In *Nelson*, 541 U.S. at 646, the Court observed: "If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. **But petitioner has been careful** throughout these proceedings, **in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled.** App. 17 (complaint) (proffering as "less invasive, less painful, faster, cheaper, and safer" the alternative procedure of "percutaneous central line placement"); *id.*, at 37-38 (affidavit of Dr. Mark Heath) (describing relative merits of the cut-down and percutaneous central line placement).

complete his execution. Rather Hill points to a recent research paper published in THE LANCET, which "hypothesizes that this dose may not be administered properly or is possibly being administered in a way that prevents it from having its intended effect. *See* Koniaris, et al., *supra.* at 1413. The study ultimately concludes that ' public review of lethal injection is warranted.' *Id.* at 1414." *Hill v. State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006). Specifically, the "letters" provide in conclusion:

> "Our data suggest that anaesthesia methods in lethal injection in the USA are flawed. Failures in protocol design, implementation, monitoring and review **might have** led to the unnecessary suffering of at least **some** of those executed. Because participation of doctors in protocol design or execution is ethically prohibited, adequate anaesthesia **cannot be certain**. **Therefore, to prevent unnecessary cruelty and suffering, cessation and public review of lethal injections is warranted."**

Leonidas G. Koniaris, et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 Lancet 1412, 1414 (2005) (Emphasis added).

In denying a stay of execution in a Missouri capital case, wherein Brown brought an identical 42 U.S.C. § 1983 action, the Eighth Circuit rejected Dr. Lubarsky's THE LANCET paper, *Brown v. Crawford*, 408 F.3d 1027 (8th Cir. May 17, 2005), *cert. denied Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005). In his dissent, Circuit Judge Bye states that the issue in *Brown*,

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No Alabama statute requires use of the cut-down, *see* Ala. Code § 15-18-82 (Lexis Supp. 2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.

"challenges the chemical protocol used by Missouri to carry out lethal injections. He contends the three-chemical sequence used by Missouri - sodium pentothal, pancuronium bromide, and potassium chloride - creates a foreseeable risk of the gratuitous infliction of unnecessary pain and suffering in violation of the Eighth Amendment."[3] Hill raised as part of his December 15, 2005 successive state court postconviction litigation the issue of whether "new evidence" has come to light based on "research letters" published in THE LANCET, that evidenced empirical data that execution by lethal injection might be flawed. The state trial court and Florida Supreme Court rejected the very argument made in his §1983 pleading below. *See Hill v State*, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006), citing *Sims*, "The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So. 2d at 665 n.17. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in

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[3] The dissent also succinctly reports what the specific issue was in *Brown*,

> "Brown's § 1983 action is based in part upon a recently-published article. See L.G. Koniaris, M.D., *Inadequate anaesthesia in lethal injection for execution*, 365 The Lancet 1412 (Apr. 16, 2005). This article appears to be the first published empirical research showing the three-chemical process used by some states to carry out lethal injections has the possibility of causing unnecessary cruelty and suffering. The study outlined in the article analyzed autopsy toxicology results from forty-nine executions carried out in Arizona, Georgia, North Carolina and South Carolina. The authors conclude in twenty-one of those cases - or 43% - the post-mortem levels of thiopental (sodium pentothal) were consistent with consciousness. In other words, the deceased was likely conscious when the potassium chloride was administered."

Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in *Sims*, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. *Id.* at 668." (Footnote omitted).

See also recent rejection of this identical claim by the United States Supreme Court in other case under warrant challenging lethal injection--*Brown v. Crawford*, 162 L. Ed. 2d 310, 125 S. Ct. 2927, 2005 U.S. LEXIS 4806 (June 13, 2005), and *Donald Jones v. Purkett*, 04A-912, (April 26, 2004); *Hicks v. Taft*, 05A-487 (November 29, 2005); *Johnston v. Roper*, 05A-206 (August 30, 2005).

Moreover in two post-*Nelson*, cases from the Fifth Circuit, *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) and White v. Johnson, 429 F.3d 572 (5th Cir. 2005), the court held:

> The district court *sua sponte* dismissed White's action for equitable relief because it determined that, just like the plaintiff in *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004), White waited too long to bring his §1983 claim. We review the district court's *sua sponte* dismissal de novo. *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998).
>
> "Method of execution actions may be brought in a §1983 suit instead of a habeas petition," but the §1983 claim should "not unduly threaten the State's ability to carry out the scheduled execution." *Harris*, 376 F.3d at 416 (citing *Nelson v. Campbell*, 541 U.S. 637, 643-48, 124 S. Ct. 2117, 2123-25, 158 L. Ed. 2d 924 (2004)). Additionally, the fact that "an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right," and "[a] court may consider the last-minute nature of an application

to stay execution in deciding whether to grant equitable relief." *Nelson*, 541 U.S. at 649, 124 S. Ct. at 2125-26 (citing *Gomez v. United States Dist. Court*, 503 U.S. 653, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992) (*per curiam*)). White argues that because he is not requesting a stay, the Supreme Court's pronouncements in *Nelson* should not apply. These rules, however, were declared by the Court in the context of last-minute § 1983 method of execution challenges as well as last-minute stay requests. *Id.* The principles enunciated by the Court are equally applicable to all types of equitable relief, including permanent injunctions, sought by inmates facing imminent execution.

When weighing equitable remedies, a court "must take into consideration the State's strong interest in proceeding with its judgment and . . . attempts at manipulation." *Id.* Further, "given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against" last-minute equitable remedy requests. *See id.* at 650, 124 S. Ct. at 2126. This presumption occurs because the inmate could have brought the action at an earlier time, which would have allowed the court to consider the merits without having to utilize last-minute equitable remedies. *See id.*

As in *Harris*, "we do not decide whether [White] properly states a claim under §1983, because even if he does, he is not entitled to the equitable relief he seeks" due to his dilatory filing. 376 F.3d at 417 (citing *Gomez*, 503 U.S. at 654, 112 S. Ct. 1652). White has been on death row for more than six years, and only now, with his execution imminent, has decided to challenge a procedure for lethal injection

that the State has been using for his entire stay on death row. *See Harris*, 376 F.3d at 417. Like Harris, White has no excuse for delaying his claim until the eleventh hour, and he cannot argue that "he was unaware of the State's intention to execute him by injecting the three chemicals he now challenges." *Id.* n1

> n1 Additional hurdles face White's complaint that, because the State might use a cut-down procedure to gain venous access, he will be subject to an Eighth Amendment violation. First, it is counter-factual, as the State denies it will resort to this procedure, and White concedes that IV access has been achieved in his hands several times. Second, this claim is barred from federal review by White's failure to exhaust it pursuant to the PLRA. *See, Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998).

White, 429 F.3d at 573-74. *See also Aldrich v. Johnson*, 388 F.3d 159 (5th Cir. 2004) (In the present case, Aldrich's §1983 action challenges the constitutionality of the protocol that Texas will use to execute him, but he does not allege that there is any specific acceptable alternative method that the state could use, or that the proposed protocol is wholly unnecessary to the execution. Thus, contrary to the situation in *Nelson*, Aldrich's § 1983 claim challenging the constitutionality of that protocol and stay of its usage will effectively prevent the state from carrying out his execution. *Nelson's* holding clearly requires that a capital defendant, in order to assert a § 1983 method-of-execution claim, must allege that, because there are alternative methods of execution, the challenged protocol is wholly unnecessary to proceeding with the execution. n11 Because Aldrich did not

allege or show that there is any alternative to the protocol that the State proposes to use in his execution, the district court properly dismissed his § 1983 action.); *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005).

Terminally, as observed by the Supreme Court in *Nelson*, 541 U.S. at 649-50:

> Moreover, as our previous decision in *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992) (*per curiam*), makes clear, the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right. *Gomez* came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute §1983 action challenging the constitutionality of California's use of the gas chamber. We left open the question whether the inmate's claim was cognizable under §1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the 11th hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*, at 654, 118 L. Ed. 2d 293, 112 S. Ct. 1652.

> A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Ibid.* Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, *see Blodgett*, 502 U.S., at 239, 116 L. Ed. 2d 669, 112 S. Ct. 674; *McCleskey*, 499 U.S., at 491, 113 L. Ed. 2d 517, 111 S. Ct. 1454, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

In the instant case Hill's "action" should be dismissed. And even assuming *arguendo*, that he has somehow met the *Nelson, supra.* test setting forth an independent §1983 action, no stay or relief should be obtained.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should deny all appellate review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, Appellee's Statement of Appellate Jurisdiction was produced using WordPerfect 9.0, in Times New Roman, font 14, and contains 4,508 words.

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(12)

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No. 05-8794

In the Supreme Court of the United States

CLARENCE E. HILL, PETITIONER

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

(CAPITAL CASE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a state prisoner's claim that the method to be used in carrying out his execution violates the Eighth Amendment may be brought in an action under 42 U.S.C. 1983 where the prisoner does not identify any alternative, permissible method of execution.

2. Whether, even assuming that such a claim is otherwise cognizable under Section 1983, petitioner's claim should be rejected because it was filed just days before his scheduled execution date and because petitioner failed to exhaust his administrative remedies.

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In the Supreme Court of the United States

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CLARENCE E. HILL, PETITIONER

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(CAPITAL CASE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the manner by which a prisoner sentenced to death may challenge the method to be used in carrying out his execution. Federal law authorizes capital punishment for a variety of criminal offenses, and provides that federal death sentences shall be "implement[ed] * * * in the manner prescribed by the law of the State in which the sentence is imposed," or, if the sentencing State does not authorize capital punishment, in the manner prescribed by a State designated by the sentencing court. 18 U.S.C. 3596(a). Lethal injection has been adopted as the sole or primary method of execution in 37 of the 38 States that currently authorize

capital punishment. See *Beardslee* v. *Woodford*, 395 F.3d 1064, 1072 & n.8 (9th Cir.), cert. denied, 543 U.S. 1096 (2005).

The Court's decision in this case will likely resolve the closely related question whether a federal prisoner sentenced to death must bring a method-of-execution claim in a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 (the analogue to a petition for habeas corpus by a state prisoner under 28 U.S.C. 2254). Several federal prisoners who have been sentenced to death by lethal injection are currently pursuing a method-of-execution claim in an action against federal prison officials for injunctive and declaratory relief. See *Roane* v. *Gonzales*, Civ. No. 05-2337 (D.D.C.). As a result of the Court's grant of certiorari in this case, their executions have been stayed. In addition, to the extent that state prisoners bring claims seeking to invalidate the method of execution used in a particular State without identifying a permissible alternative, the federal government has an interest in the ultimate resolution of those claims, insofar as it may delay or effectively block federal executions to be implemented in accordance with that State's procedure. The United States therefore has a substantial interest in this case.

STATEMENT

1. On October 19, 1982, petitioner and an accomplice, Cliff Jackson, stole a car and pistol in Mobile, Alabama, and drove to Pensacola, Florida, where they robbed a savings and loan at gunpoint. Officers arrived at the scene while the robbery was still in progress. Petitioner fled the building through a back door; Jackson fled through the front and was apprehended. While two of the officers were handcuffing Jackson, petitioner snuck up behind the officers and shot them in cold blood, killing one and wounding the other. *Hill* v. *State*, 477 So. 2d 553, 554 (Fla. 1985).

2. In 1983, petitioner was convicted in Florida state court of first-degree murder and various other offenses, and sentenced to death. At the time petitioner was sentenced, Florida law provided that electrocution was the method of execution. See Fla. Stat. Ann. § 922.105 (West 1999). On direct appeal, the Florida Supreme Court affirmed petitioner's convictions, but reversed his sentence on the ground that the trial court had erred during the jury-selection process. *Hill* v. *State*, 477 So. 2d 553 (1985). On remand, petitioner was again sentenced to death. The Florida Supreme Court affirmed petitioner's sentence, *Hill* v. *State*, 515 So. 2d 176 (1987), and this Court denied review, 485 U.S. 993 (1988).

Petitioner then filed both a motion for post-conviction relief in state court and a petition for habeas corpus, pursuant to 28 U.S.C. 2254, in federal court. The trial court denied petitioner's motion for post-conviction relief, and the Florida Supreme Court affirmed. *Hill* v. *Dugger*, 556 So. 2d 1385 (1990). The federal district court partially granted petitioner's habeas petition on the ground that the state courts had failed to conduct a proper harmless-error inquiry after one of the submitted aggravating factors had been invalidated. The Florida Supreme Court subsequently reopened petitioner's appeal and held that any error was harmless. *Hill* v. *State*, 643 So. 2d 1071 (1994). This Court denied review. 516 U.S. 872 (1995). Petitioner then filed an amended habeas petition, which the district court denied. The court of appeals affirmed, *Hill* v. *Moore*, 175 F.3d 915 (11th Cir. 1999), and this Court again denied review, 528 U.S. 1087 (2000).

In 2000, the state legislature changed the presumptive method of execution in Florida from electrocution to lethal injection. See Fla. Stat. Ann. § 922.105(1) (West 2005) (providing that "a death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution" within a specified pe-

riod). Petitioner did not elect to be executed by electrocution. In 2003, petitioner filed a second motion for post-conviction relief in state court, in which he did not challenge the constitutionality of Florida's new method of execution. The trial court denied the motion, and the Florida Supreme Court affirmed. *Hill* v. *State*, 904 So. 2d 430 (2005) (Table).

3. On November 29, 2005, the Governor of Florida signed a death warrant, and petitioner's execution was scheduled for January 24, 2006. On December 15, 2005, petitioner filed a third motion for post-conviction relief in state court, contending for the first time, *inter alia*, that execution by lethal injection, as administered by the State of Florida, constitutes cruel and unusual punishment under the Eighth Amendment. The trial court denied the motion on grounds of procedural default. The Florida Supreme Court affirmed. *Hill* v. *State*, No. 06-2, 2006 WL 91302 (Jan. 17, 2006). The Florida Supreme Court noted that it had rejected a similar claim in *Sims* v. *State*, 754 So. 2d 657, cert. denied, 528 U.S. 1183 (2000), and it rejected petitioner's argument that he was entitled to an evidentiary hearing based on an article recently published in a British medical journal, *The Lancet*, on the ground that the article "is inconclusive" and "does not sufficiently call into question our holding in *Sims*." *Hill*, 2006 WL 91302, at *2.[1] This Court denied review. 126 S. Ct. 1441 (2006).

4. On January 20, 2006, four days before his execution date, petitioner filed an action in federal district court against various state officials pursuant to 42 U.S.C. 1983. J.A. 16-23. In his complaint, petitioner again contended that execution by lethal injection, as administered by the State of Florida, con-

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[1] To the extent that the Florida Supreme Court rejected petitioner's claim on the merits, rather than on the ground that it was procedurally defaulted, the Florida Supreme Court's decision could have preclusive effect in any subsequent action under 42 U.S.C. 1983. See *Migra* v. *Warren City Sch. Dist.*, 465 U.S. 75, 80-85 (1984); *Allen* v. *McCurry*, 449 U.S. 90, 96-105 (1980).

stitutes cruel and unusual punishment. J.A. 21. Specifically, petitioner contended that Florida's use of a succession of three chemicals—sodium pentothal, pancuronium bromide, and potassium chloride—"creat[ed] a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed." J.A. 18.[2] Again citing the *Lancet* article, petitioner alleged that, in a number of executions using the same sequence of chemicals, prisoners received an insufficient dose of sodium pentothal and thus suffered pain from the subsequent chemicals. J.A. 20. Petitioner sought a preliminary injunction to allow consideration of his claim, and a permanent injunction "barring defendants from executing [him] in the manner they currently intend." J.A. 22.

5. On January 21, 2006, the district court dismissed petitioner's complaint. J.A. 11-15. The court reasoned that petitioner's Section 1983 action was "the functional equivalent of a successive habeas corpus petition," and petitioner thus could not proceed without first obtaining leave to file from the court of appeals under 28 U.S.C. 2244. J.A. 12. The court rejected petitioner's contention that the *Lancet* article constituted "newly discovered evidence" on the ground that, "[w]hile the *Lancet* article may be new, * * * the factual basis of [petitioner's] claim has certainly been raised and disposed of in numerous cases, both in Florida and in other states." J.A. 14-15. The court thus determined that "[petitioner] has made no showing that he could not have discovered these underlying predicates through the exercise of due diligence." J.A. 14.

6. On January 24, 2006, the court of appeals affirmed. J.A. 9-10. The court reasoned that "[i]t is clear to us that the district court lacked jurisdiction to consider [petitioner's]

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[2] Lethal injection by means of a succession of three chemicals—sodium pentothal, pancuronium bromide, and potassium chloride—is the predominant method of execution in the United States today and is used by at least 27 States. See *Beardslee*, 395 F.3d at 1072.

claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it." J.A. 10. The court added that any application for leave to file a second or successive habeas petition would be denied in any event, on the ground that it would not meet the requirements of 28 U.S.C. 2244(b)(2). J.A. 10.[3]

7. Later that day, Justice Kennedy granted a temporary stay. The Court granted certiorari on the following day and entered a stay pending decision on the merits.

SUMMARY OF ARGUMENT

A. Petitioner's challenge to execution by lethal injection, as administered by the State of Florida, is cognizable only in a petition for habeas corpus under 28 U.S.C. 2254, and not in an action under 42 U.S.C. 1983. This Court has repeatedly affirmed the principle that certain types of claims by prisoners fall within the exclusive scope of the habeas statute. Specifically, this Court has distinguished between challenges to the *conditions* of a prisoner's confinement, which can proceed in an action under Section 1983, and challenges to the *fact* of a prisoner's confinement or duration of his sentence, which can proceed only in a habeas petition. Where a prisoner challenges a particular method of execution but identifies an alternative, permissible method of execution, that claim is akin to a conditions-of-confinement claim, and therefore is cognizable in a Section 1983 action. But where a prisoner contends that execution per se constitutes cruel and unusual punishment—*i.e.*, that the particular method of execution being contemplated by the State *and any other method of execution* would be unconstitutional—that claim amounts to a challenge to the prisoner's sentence because it effectively seeks a reduction in

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[3] Petitioner also filed an application for leave to file a second or successive habeas petition, in which he raised other claims. The court of appeals denied that application in a separate order. 437 F.3d 1080 (11th Cir. 2006).

the sentence from death to life imprisonment, and therefore is cognizable only in a habeas petition.

The claim at issue in this case more closely resembles the latter type of claim, and therefore is cognizable only in habeas. Petitioner has challenged the method of execution used by Florida to deliver lethal injection, but has pointedly declined to identify any permissible alternative method. Where a prisoner challenges his method of execution but fails to identify any permissible alternative, it is reasonable to construe that claim as a challenge to his execution per se. Moreover, such a claim (if successful) is likely to delay, and potentially delay substantially, the prisoner's execution. If such a claim could proceed in a Section 1983 action, then prisoners could use Section 1983 as a means to delay executions simply by waiting until the eve of execution to file suit, as petitioner did here. Moreover, if such claims were cognizable under Section 1983, a prisoner could circumvent any restrictions on his ability to contend in a habeas petition that execution per se constitutes cruel and unusual punishment through the simple expedient of challenging particular methods of execution *seriatim*. The better view, therefore, is that petitioner's claim—which seeks relief different only in degree from an outright injunction against his execution—is cognizable only in a petition for habeas corpus.

B. If petitioner can pursue his claim only in a habeas petition, his action is plainly barred as both successive and untimely. Petitioner's contention that his action should be treated as a "first" habeas petition, rather than a "second or successive" one, is not fairly included in the questions presented and was not passed on below, and therefore is not properly before this Court. In any event, it lacks merit. If petitioner's Section 1983 action were treated as a habeas petition, it would unambiguously be barred as a second or successive habeas petition that does not come within the stringent

statutory exceptions for such petitions established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Moreover, even if petitioner's claim were not barred outright as a second or successive habeas petition, it would be out of time in any event. AEDPA establishes a one-year statute of limitations for habeas claims. Petitioner did not file this action until more than *six years* after Florida adopted lethal injection as its preferred method of execution.

C. Even if prisoners could pursue method-of-execution claims in Section 1983 actions, petitioner's action is improper. This Court has made clear that, in considering whether a prisoner is entitled to injunctive relief in a Section 1983 action, a court can consider whether the prisoner has engaged in manipulation or undue delay. Such factors would point to denying relief here, where petitioner waited until just days before his scheduled execution before filing this Section 1983 action. Moreover, petitioner failed to exhaust his administrative remedies before doing so, which provides an independent basis for sustaining the lower courts' dismissal of this action. Where a prisoner challenges the method of execution, it is particularly important that the State be provided an opportunity to address that claim, and to consider potential alternatives, before an action may be brought in federal court.

Indeed, the litigation incentives surrounding last-minute capital filings led Congress to enact a variety of carefully focused requirements for the filing of habeas petitions in that setting. As the challenge here amounts to an effort to forestall the sentence, it should be construed as a habeas petition. But even if this Court construes it to be a valid Section 1983 action, the Court should look to Congress's treatment of habeas petitions and import analogous limitations on last-minute filings, like this one, raising claims that could have been filed earlier. Likewise, this Court should vigorously enforce the limits imposed on civil-rights actions under the PLRA.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S ELEVENTH-HOUR CHALLENGE TO THE METHOD OF HIS EXECUTION WAS FORECLOSED

Petitioner contends that execution by lethal injection, as administered by the State of Florida, constitutes cruel and unusual punishment. That claim, like a more categorical claim that execution per se constitutes cruel and unusual punishment, is cognizable only in a petition for habeas corpus under 28 U.S.C. 2254, and not in an action under 42 U.S.C. 1983. Regardless of how petitioner's claim is characterized, moreover, it is clear that this last-ditch action cannot proceed. The court of appeals' decision should therefore be affirmed.

A. Petitioner's Claim Must Be Brought In A Petition For Habeas Corpus

Petitioner contends (Br. 17-29) that his method-of-execution claim was cognizable in an action under 42 U.S.C. 1983. That contention lacks merit.

1. "Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under * * * 42 U.S.C. § 1983." *Muhammad* v. *Close*, 540 U.S. 749, 750 (2004) (per curiam). Although Section 1983 by its terms provides a broad remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," this Court has held that certain types of claims are cognizable only under the habeas statute. Specifically, "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." *Id.* at 750.

In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), three state prisoners brought an action for injunctive relief under Section 1983, seeking restoration of good-time credits that they

claimed had been unconstitutionally revoked. The Court held that the prisoners could proceed with their claims only in a petition for habeas corpus, not in a Section 1983 action. *Id.* at 500. The Court reasoned that the habeas statute was "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement" and that, where a prisoner's claim "goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration," "[s]uch a challenge is just as close to the core of habeas corpus as an attack on the prisoner's conviction." *Id.* at 489.

By contrast, this Court has "repeatedly permitted prisoners to bring § 1983 actions challenging the *conditions* of their confinement." *Wilkinson* v. *Dotson*, 544 U.S. 74, 84 (2005) (emphasis added); see, *e.g.*, *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971) (per curiam) (conditions in maximum security); *Cooper* v. *Pate*, 378 U.S. 546, 546 (1964) (per curiam) (access to religious publications). Such a claim falls outside "the heart of habeas corpus" because it does not "challeng[e] the fact or duration of [a prisoner's] physical confinement itself," nor does it "seek[] immediate release or a speedier release from that confinement." *Preiser*, 411 U.S. at 498.

In addition, this Court has recognized that a prisoner's claim may be cognizable in a Section 1983 action if it seeks "relief unavailable in habeas, notably damages," except where it "impl[ies] the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement." *Muhammad*, 540 U.S. at 751. With respect to such "hybrid" claims (*id.* at 750), the Court has held that a prisoner must first challenge his conviction or sentence by other means, such as a petition for habeas corpus. See *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994). The exception for so-called "hybrid" actions, however, is a narrow one. "[W]hen a state prisoner seeks damages in a § 1983 suit,

the district court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Ibid.* (emphasis added). The Court has reasoned that a broader exception would "cut off potentially valid damages actions" that "could otherwise have gone forward had the plaintiff not been convicted." *Nelson* v. *Campbell*, 541 U.S. 637, 647 (2004). Although these cases typically involve claims for damages, see *id.* at 646 (characterizing exception as applicable to "civil rights damages actions"), this Court has indicated that the same rule would apply where a prisoner seeks declaratory relief as an adjunct to his claim for damages, see *Edwards* v. *Balisok*, 520 U.S. 641, 648 (1997); *Wolff* v. *McDonnell*, 418 U.S. 539, 554-555 (1974); prospective injunctive relief, see *Edwards*, 520 U.S. at 648; *Wolff*, 418 U.S. at 555; or injunctive relief that differs in kind from an injunction ordering the prisoner's release or shortening his confinement, see *Wilkinson*, 544 U.S. at 82.

2. In *Nelson* v. *Campbell*, *supra*, this Court considered how to categorize a claim seeking injunctive relief enjoining Alabama's use of a so-called "cut-down" procedure in connection with an execution by lethal injection. Because the prisoner's veins had been severely compromised by years of drug abuse, the State informed the prisoner shortly before his execution that it would make an incision in his arm or leg in order to gain venous access. 541 U.S. at 640-642. The prisoner brought a Section 1983 action, alleging that the use of the cut-down procedure constituted cruel and unusual punishment.

The Court held that the prisoner could pursue his claim in a Section 1983 action. *Nelson*, 541 U.S. at 644-647. In so holding, the Court emphasized two essential features of the prisoner's claim. First, the Court noted that the State had

conceded that a prisoner who had not been sentenced to death could bring a similar claim if the State had sought to use the cut-down procedure to gain venous access *for purposes of providing medical treatment*—and that such a claim would be analogous to a conventional conditions-of-confinement claim and therefore cognizable in a Section 1983 action. See *id.* at 644. The Court concluded that there was "no reason on the face of the complaint to treat [the instant prisoner's] claim differently solely because he has been condemned to die." *Id.* at 645. For that reason, the Court explained that it was unnecessary to resolve the question of how to categorize method-of-execution claims generally. See *id.* at 644.

Second, the Court observed that the prisoner "ha[d] alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled": specifically, that the State could instead have gained venous access by means of a percutaneous central line. *Nelson*, 541 U.S. at 646. The Court accordingly concluded that "the gravamen of [the prisoner's] entire claim is that the use of the cut-down would be *gratuitous*." *Id.* at 645. The Court suggested that the outcome might be different "[i]f as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter [the prisoner] were unable or unwilling to concede acceptable alternatives for gaining venous access." *Ibid.*

3. a. The foregoing decisions—and, in particular, this Court's decision in *Nelson*—provide the appropriate framework for categorizing method-of-execution claims.

On the one hand, where a prisoner challenges a particular method of execution but identifies an alternative, authorized method of execution, that claim closely resembles the claim at issue in *Nelson*, and therefore could be brought in a Section 1983 action. Although such a claim by definition could be brought only in connection with an impending execution, that

claim necessarily does not "call into question the 'fact' or 'validity' of the sentence itself," because it is clear that, "by simply altering its method of execution, the State can go forward with the sentence." *Nelson*, 541 U.S. at 644. Such a claim is "properly viewed as [a] challenge[] to the conditions of a condemned inmate's death sentence," *ibid.*, and, like a conditions-of-confinement claim brought by any other prisoner, is cognizable in a Section 1983 action.[4]

On the other hand, where a prisoner contends that execution per se constitutes cruel and unusual punishment—*i.e.*, that the particular method of execution being contemplated by the State *and any other method of execution* would be unconstitutional—that claim can only be brought in a habeas petition. Such a claim would be tantamount to a challenge to the prisoner's death sentence itself, because "imposition of the death penalty presupposes a means of carrying it out." *Nelson*, 541 U.S. at 644. Although this Court has never explicitly addressed the issue, lower courts have held that challenges to a prisoner's death sentence, like challenges to the duration of a non-death sentence, are cognizable only in habeas. See, *e.g.*, *Gilreath* v. *State Bd. of Pardons & Paroles*, 273 F.3d 932, 933 (11th Cir. 2001); *Moody* v. *Rodriguez*, 164 F.3d 893, 893-894 (5th Cir. 1999) (per curiam); *Buchanan* v. *Gilmore*, 139 F.3d 982, 983-984 (4th Cir. 1998) (per curiam).

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[4] In *Nelson*, this Court suggested that the analysis might be different where a prisoner was challenging the State's method of execution *as established by statute*—for example, if petitioner was here challenging the constitutionality of execution by lethal injection *simpliciter*, rather than execution by lethal injection *as administered by the State of Florida*. 541 U.S. at 644. The Court reasoned that, where "[a] finding of unconstitutionality would require statutory amendment or variance," such a result would "impos[e] significant costs on the State and the administration of its penal system." *Ibid.* The same result would follow from a challenge to the lone authorized method of execution, even if it pointed to a specific unauthorized alternative. Here, the statute at issue does not specify the precise means by which a lethal injection will be administered.

b. The claim at issue in this case more closely resembles the latter type of claim, and therefore can be brought only in a habeas petition. Although petitioner in his complaint sought to enjoin respondents only from "executing [him] in the manner they currently intend," J.A. 22, petitioner nowhere specifically identified an alternative method by which he could permissibly be executed.[5] Nor has petitioner done so before this Court, instead stating only (with consistent ambiguity) that he "could still be executed by a different procedure, including a different means of lethal injection chosen by the [State]." Pet. Br. 21; see *id.* at 12 (suggesting that "[petitioner] could be executed by a different means of lethal injection chosen by the [State]"); *id.* at 17 (stating that "[petitioner] concedes that other methods of lethal injection the [State] could choose to use would be constitutional"); *id.* at 22 (contending that "the [State] could readily adopt any one of a number of different approaches to lethal injection that would end [petitioner's] life without a foreseeable likelihood of excruciating pain"). Except in the abstract, therefore, petitioner remains "unable or

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[5] In his complaint, petitioner alleged that, in a number of executions in various States using the same sequence of chemicals that Florida uses, prisoners received an insufficient dose of sodium pentothal, with the result that they were not properly sedated and thus suffered pain from the administration of the subsequent chemicals. J.A. 20. Petitioner's complaint therefore might be read to imply that, if the dose of sodium pentothal used by Florida were to be increased, his execution could constitutionally proceed. Petitioner, however, has pointedly stopped short of explicitly embracing that alternative method (or saying by how much, in his view, the dosage of sodium pentothal should be increased), and he still does not embrace it before this Court—even though he cites a decision from another court that effectively adopted it (together with other modifications). See Pet. Br. 22 (citing *Morales* v. *Hickman*, No. 06-219, 2006 WL 335427, at *8 (N.D. Cal. Feb. 14, 2006), aff'd, 438 F.3d 926 (9th Cir.), cert. denied, 126 S. Ct. 1314 (2006)). As discussed in the text above, specification of a lawful alternative means of executing the death sentence not only makes the claim cognizable under Section 1983, but also prevents manipulation of the judicial process.

unwilling to concede acceptable alternatives" that "would have allowed the State to proceed with the execution as scheduled." *Nelson*, 541 U.S. at 645, 646. Indeed, the statements made in petitioner's brief about other methods of execution are sufficiently vague that petitioner presumably could attempt to challenge the validity of any alternative method of execution that the State subsequently adopted.

Where a prisoner challenges his method of execution but fails to identify a permissible alternative, a finding of unconstitutionality will "impos[e] significant costs on the State and the administration of its penal system." *Nelson*, 541 U.S. at 644. At a minimum, the State will be required to devise an alternative method of execution, which will then potentially be subject to further challenge. See *In re Sapp*, 118 F.3d 460, 463 (6th Cir.) (noting that a method-of-execution claim that does not identify a permissible alternative "is not equivalent to a simple 'conditions of confinement' action, such as a claim that a prisoner's cell is too cold, though the prisoner doesn't object to being imprisoned in a warmer cell"), cert. denied, 521 U.S. 1130 (1997). While it is possible that the State will eventually be able to carry out the prisoner's death sentence, this Court has repeatedly recognized that "a State retains a significant interest in meting out a sentence of death in a timely fashion." *Ibid.*; see *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998) (noting that a State has a "powerful and legitimate interest" in carrying out an execution once first federal habeas proceedings have been completed) (citation omitted). Although a State's ability to carry out an execution may be temporarily delayed even where a prisoner identifies a suitable alternative method of execution (while the prisoner's claim is adjudicated and any alternative method is implemented), it is far more likely to be delayed, and delayed substantially, where there is no guarantee that the State will be able to execute the prisoner even after an alternative method

has been devised. Requiring the prisoner to identify a specific alternative also allows the State and the reviewing court to assess the legality and validity of that alternative. When the alternative is unlawful or impractical, the challenge will produce precisely the kind of costs identified in *Nelson*.

Indeed, if a prisoner were able to bring a challenge to a particular method of execution in a Section 1983 action without identifying a permissible alternative, a prisoner could "seek[] *sub silentio* to preclude imposition of the death penalty" (Pet. Br. 22) simply by challenging individual methods of execution *seriatim*. A prisoner who wished to argue that execution per se constitutes cruel and unusual punishment could circumvent any restrictions on his ability to bring that claim in a habeas petition through the "simple expedient of putting a different label on [his] pleadings" (*Preiser*, 411 U.S. at 490): namely, by presenting his claim in a Section 1983 action as a narrower challenge to the *particular* method of execution being used by the State, with the knowledge that he could subsequently challenge any *other* method adopted by the State if his initial claim were successful. As previously discussed, the complaint in this case appears to be artfully drafted to leave open the option of pursuing that strategy. A rule that prisoners could pursue method-of-execution claims like petitioner's in Section 1983 actions would thus effectively permit claims challenging the constitutionality of capital punishment per se in Section 1983 actions as well.[6]

4. Relying on the test employed by this Court to categorize so-called "hybrid" cases—*i.e.*, cases in which the prisoner seeks "relief unavailable in habeas," *Muhammad*, 540 U.S. at

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[6] Although petitioner abstractly contends (Br. 22) that "[h]is is not a challenge objecting merely to the pain inherent in death," he does not disavow any intention to challenge any alternative method of execution adopted by Florida. That is unsurprising, given that petitioner fails to identify any alternative method of execution that he believes would be permissible.

751—petitioner contends (Br. 20) that his claim should be cognizable in a Section 1983 action because the claim would "not *necessarily* imply the invalidity of [his] conviction or the State's ability ultimately to carry out the death sentence." That contention is unsound for two principal reasons.

a. First, this case is not properly classified as a "hybrid" case at all. Petitioner does not seek damages, and the relief that he does seek—a permanent injunction "barring defendants from executing [him] in the manner they currently intend," J.A. 22—differs only in degree, not in kind, from the relief usually awarded by habeas courts (an order directing a prisoner's immediate release from custody or invalidating or modifying a prisoner's sentence). Cf. 28 U.S.C. 2243 (providing that a court considering a habeas petition may "dispose of the matter as law and justice require"); see generally *Wilkinson*, 544 U.S. at 85-86 (Scalia, J., concurring) (discussing forms of relief authorized by habeas statute). This case is therefore distinguishable in a critical respect from *Wilkinson*, in which the prisoners sought injunctions that would at most entitle them to a new hearing (or further administrative review)—not injunctions that would directly (or indirectly) operate on their convictions or sentences. See *id.* at 81, 82.

Petitioner contends (Br. 17, 19) that, in *Nelson*, this Court held that the claim at issue was cognizable in a Section 1983 action because relief on that claim would not *necessarily* prevent the State from carrying out its execution. That is incorrect. In *Nelson*, the Court did not classify the prisoner's claim as a "hybrid" claim—nor could it have, since the prisoner was seeking an injunction preventing the State from using the cut-down procedure. 541 U.S. at 648. Instead, the Court held only that, because the prisoner had "alleged alternatives that * * * would have allowed the State to proceed with the execution as scheduled" (and because the prisoner could have brought a similar claim if the State had sought to

use the cut-down procedure for non-execution-related purposes), the prisoner's claim was properly brought as a Section 1983 action under *Preiser* and its progeny. *Id.* at 643-646. Only *after* the Court reached that conclusion did the Court state that "our holding here is consistent with our approach to *civil rights damages actions*," on the ground that "[the prisoner's] challenge to the cut-down procedure would [not] *necessarily* prevent Alabama from carrying out its execution." *Id.* at 646-647 (first emphasis added). Far from characterizing the claim at issue as a "hybrid" claim, therefore, the Court in *Nelson* merely looked by analogy to its earlier cases involving such claims, and concluded that the outcome would be the same even under the test applicable to those claims.

Moreover, *Nelson* itself confirms that the test applicable to "hybrid" claims is not relevant here. In *Nelson*, the Court reasoned that the "necessarily implies" test was deliberately narrow because "[t]o hold otherwise would have cut off potentially valid damages actions" that "could otherwise have gone forward had the plaintiff not been convicted." 541 U.S. at 647. That rationale, however, is wholly inapposite where, as here, the claim at issue would not have existed but for the fact that the prisoner had been sentenced to death. In such a situation, the "hybrid" cases are not directly on point, and the appropriate inquiry is instead simply whether the claim at issue more closely resembles a challenge to a prisoner's *conditions* of confinement or a challenge to the *fact* of confinement (or the duration of sentence).

b. Second, even assuming that this case were properly classified as a "hybrid" case, the "necessarily implies" test is satisfied here. Petitioner suggests (Br. 20) that the relevant question is whether his claim would necessarily affect "the State's ability *ultimately* to carry out the death sentence" (emphasis added). In *Nelson*, however, the Court stated only that, in the capital context, the appropriate question was

whether a prisoner's claim "would *necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647. A claim such as petitioner's—which identifies no permissible alternative methods of execution—*does* necessarily prevent the State from carrying out its execution in the relevant sense: it necessarily prevents the State from carrying out its execution in a timely manner and in the manner of the State's own choosing. At a minimum, such a claim creates a sufficient likelihood that an execution will be substantially delayed that, particularly given the State's interest in "meting out a sentence of death in a timely fashion" (*id.* at 644), it should be cognizable only in habeas.

B. Petitioner's Claim Cannot Proceed In Habeas Corpus

In the alternative, petitioner contends (Br. 29-37) that, even assuming that his method-of-execution claim is cognizable only in a petition for habeas corpus under 28 U.S.C. 2254, this action should be allowed to proceed because his Section 1983 complaint may be recharacterized as a "first" petition. That contention is unavailing.

1. As a preliminary matter, petitioner's contention that his complaint should be treated as a "first" habeas petition, rather than a "second or successive" one, is not fairly included in the questions presented. See Sup. Ct. R. 14.1(a). Both of those questions focus on whether petitioner's claim is cognizable in a Section 1983 action—not on whether, if it is not and the complaint as recharacterized as a habeas petition, it should be treated as a "first" or "second" one. See Pet. i. The body of the certiorari petition supports that interpretation: far from suggesting that his complaint would constitute a "first" habeas petition if it were recharacterized, petitioner conceded that a recharacterized complaint would "amount[] to a successive habeas petition," and seemingly also conceded that such a petition would be barred. Pet. 14.

Moreover, although the district court concluded that petitioner's Section 1983 action was "the functional equivalent of a successive habeas corpus petition," J.A. 12, petitioner does not appear to have challenged that conclusion on appeal, and instead argued only that his claim was cognizable in a Section 1983 action in the first place. See J.A. 36-47. It is therefore unsurprising that the court of appeals not only agreed with the district court that petitioner's claim was not cognizable in a Section 1983 action, but also agreed that petitioner's action, if recharacterized, would constitute an impermissible "second" habeas petition. J.A. 10. Because petitioner failed to argue below that his recharacterized action should be treated as a "first" habeas petition, and failed to present that issue in the petition, the issue is not properly before this Court. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

2. In any event, there is no merit to petitioner's contention that this action should be treated as a "first" habeas.

a. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), "Congress established a gatekeeping mechanism for the consideration of second or successive habeas corpus applications in the federal courts." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (internal quotation marks and citation omitted). AEDPA specifically provides that "[a] claim presented in a second or successive habeas corpus application under Section 2254 that was not presented in a prior application shall be dismissed" unless (1) the claim relies on a new rule of constitutional law meeting certain requirements or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* the facts underlying the claim would sufficiently establish that the applicant was not guilty of the underlying offense. 28 U.S.C. 2244(b)(2); see 28 U.S.C.

2255 para. 8 (imposing similar limitations on second or successive motions under 28 U.S.C. 2255).[7]

Under the plain language of that provision, petitioner's recharacterized action is unambiguously barred. That action would constitute a "second" habeas petition, because petitioner filed a previous habeas petition in 1990, soon after his conviction and sentence became final. See *Hill*, 175 F.3d at 919 n.4 (listing claims advanced in first habeas petition). And any "second" habeas petition would not qualify for either exception to the bar on such petitions. Although it is true that the "factual predicate" of petitioner's claim (*i.e.*, that Florida was employing the challenged method of execution) could not have been discovered "until after his federal habeas proceedings were final" (Pet. Br. 13), petitioner does not contend that he could satisfy the conjunctive actual-innocence requirement of Section 2244(b)(2)—and, indeed, appears to have conceded in his petition that he could not. See Pet. 14. Accordingly, the lower courts correctly held that petitioner's recharacterized action could not proceed as a habeas petition.

b. Petitioner contends (Br. 33-35) that, before AEDPA, his recharacterized action could be maintained under the abuse-of-the-writ doctrine, and that the abuse-of-the-writ doctrine "provides the relevant context here." That is incorrect. Before AEDPA, a new claim could validly be presented in a successive habeas petition *either* if the petitioner could show cause and prejudice for his failure to raise the claim in his earlier petition (*e.g.*, by showing that "the factual or legal basis for a claim was not reasonably available to counsel") *or*

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[7] Before proceeding with a second or successive petition, a petitioner must apply for leave to file in the court of appeals, making "a prima facie showing" that he satisfies the requirements of either exception. 28 U.S.C. 2244(b)(3); see 28 U.S.C. 2255 para. 8. Although petitioner sought leave in the court of appeals to file a second petition containing *other* claims, see J.A. 9, he did not seek leave to present his method-of-execution claim.

if the petitioner could show that a fundamental miscarriage of justice would result from a failure to consider the claim (*e.g.*, by showing that the alleged violation "probably has caused the conviction of one innocent of the crime"). *McCleskey* v. *Zant*, 499 U.S. 467, 493-494 (1991).

In AEDPA, however, Congress overrode that common-law standard and unambiguously required that "a successive claim satisfy *both* of [the] conditions" discussed in *McCleskey*. Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1386 (5th ed. 2003) (emphasis added). In Section 2244(b)(2), Congress used the word "and," rather than "or," to specify the requirements for bringing a successive action. Congress's tightening of the conditions under which prisoners, including prisoners sentenced to death, could file second or successive habeas petitions is entirely consistent with its overarching objective, in enacting AEDPA, of "reduc[ing] delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003). A rule that "a petition is not second or successive simply because it does not violate the old abuse of the writ doctrine," therefore, "would run counter to congressional intent." *Sustache-Rivera* v. *United States*, 221 F.3d 8, 13 (1st Cir. 2000), cert. denied, 532 U.S. 924 (2001); see *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) (noting that "judgments about the proper scope of the writ are normally for Congress to make") (internal quotation marks and citation omitted).

c. Petitioner further contends (Br. 30) that, in *Stewart* v. *Martinez-Villareal*, *supra*, and *Slack* v. *McDaniel*, 529 U.S. 473 (2000), this Court "rejected the view that § 2244(b) applies to all claims brought in a *numerically* 'second' (or subsequent) petition." But neither of those cases supports the considerably broader proposition advanced by petitioner: *viz.*, that a numerically second petition may be treated as a "first"

petition simply because the factual predicate for the underlying claim did not exist at the time of the earlier petition.

In *Stewart*, a prisoner filed a habeas petition contending that he was incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986). The district court dismissed the *Ford* claim, reasoning that it was premature because the prisoner's execution was not imminent. Several years later, after the State obtained an execution warrant, the prisoner moved to reopen his *Ford* claim. The district court refused, on the ground that the motion constituted the equivalent of a second or successive habeas petition. The court of appeals reversed, holding that the restrictions on second or successive habeas petitions in Section 2244(b) were inapplicable to *Ford* claims. This Court affirmed, but on a far narrower ground. The Court reasoned that the prisoner's filing did not constitute a second or successive habeas petition, but instead constituted merely a motion to *reopen* his first petition. 523 U.S. at 643. The Court concluded that AEDPA did not bar the prisoner from filing such a motion, explaining that the prisoner "was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." *Ibid.* The Court therefore expressly left open the supplemental question (belatedly) presented by petitioner to this Court: namely, whether a numerically second petition could be treated as a "first" petition where a prisoner's claim was not "ripe" at the time of the prisoner's numerically first petition (and the prisoner failed to include the claim in the earlier petition). *Id.* at 645 n.*.

In *Slack*, a prisoner filed a habeas petition containing both exhausted and non-exhausted claims. The district court dismissed the petition for failure to exhaust. After the prisoner exhausted his remedies in state court, he filed a new petition in federal court. The district court dismissed the petition on the ground that it was second or successive, and the court of

appeals denied a certificate of probable cause. This Court reversed, but again on a narrow ground. The Court reasoned that, where an initial mixed petition had been dismissed for failure to exhaust, "[i]t is * * * more appropriate to treat the initial mixed petition as though it had not been filed." 529 U.S. at 487-488. The Court therefore concluded that "[a] petition filed after a mixed petition has been dismissed * * * is to be treated as any other first petition and is not a second or successive petition." *Id.* at 487 (internal quotation marks and citation omitted). The Court again did not address the question whether a numerically second petition could be treated as a "first" petition where a prisoner's claim was not "ripe" at the time of the prisoner's first petition.

3. In any event, if petitioner's action could be treated as a "first" petition, it is plainly untimely.

a. Method-of-execution claims are different from incompetency claims and are not categorically "unripe" at the moment a defendant is sentenced to death. A claim that a prisoner is incompetent to be executed under *Ford* v. *Wainwright*, *supra*, arguably becomes "ripe" only when the prisoner's execution is imminent, insofar as the claim depends on the prisoner's competency at (or shortly before) the moment of execution. But see *Richardson* v. *Johnson*, 256 F.3d 257, 258 (5th Cir.), cert. denied, 533 U.S. 942 (2001); *Scott* v. *Mitchell*, 250 F.3d 1011, 1013 (6th Cir.), cert. denied, 533 U.S. 912 (2001). A claim that the State's method of execution is unconstitutional, however, ordinarily can be brought on direct appeal and, if it is rejected, in a prisoner's first federal habeas petition. For example, if, at the time a prisoner was sentenced, state law provided that lethal injection was the primary method of execution and it was known that the State used a particular method of lethal injection, then the prisoner could readily challenge that method in his direct appeal and in his first federal habeas petition. Even if this Court were to

recognize an exception to the restrictions on second or successive habeas petitions for petitions containing "unripe" claims, therefore, method-of-execution claims should fall outside the exception where the method of execution being challenged was already in place at the time the prisoner was sentenced.

In this case, petitioner could not have brought his particular method-of-execution claim on direct appeal or in his 1990 federal habeas petition because Florida law at the time provided that electrocution, not lethal injection, was the State's method of execution. Petitioner's particular claim arose, or "ripened," on January 14, 2000, when Florida adopted lethal injection as its preferred method of execution. See *Rutherford* v. *Crosby*, 438 F.3d 1087, 1092 (11th Cir. 2006) (noting that "[t]here has been no suggestion that the lethal injection chemicals or procedures used by Florida have changed in the last six years"). AEDPA, however, provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. 2244(d)(1); see 28 U.S.C. 2255 para. 6. Assuming that the limitations period could run from the date on which a previously "unripe" claim became "ripe," the limitations period on petitioner's claim would have expired on January 14, 2001, one year after Florida's adoption of lethal injection as its preferred method of execution—and more than five years before petitioner filed the instant action.[*]

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[*] AEDPA also provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2). Petitioner, however, did not raise his method-of-execution claim in a motion for post-conviction relief in state court until December 15, 2005—several *years* after the one-year limitations period had run.

To be sure, AEDPA provides that the limitations period runs from the *latest* of several dates, including "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. 2244(d)(1)(D); see 28 U.S.C. 2255 para. 6. Petitioner notes (Br. 5-6) that, although Florida adopted lethal injection as its method of execution by statute in 2000, it did not specify in that statute exactly how lethal injection should be implemented. By no later than February 14, 2000, however, it became known that Florida intended to use the succession of three chemicals that petitioner now challenges, when the Florida Supreme Court rejected a similar challenge to the constitutionality of Florida's method of execution (and, in so doing, discussed at some length testimony from Florida Department of Corrections officials providing "specific details about the chemicals to be administered"). *Sims*, 754 So. 2d at 665 & n.17. At least by that date, therefore, the "factual predicate" of petitioner's claims not only "could have been discovered," but had been publicly disclosed. Petitioner, however, instead waited almost five years and brought this challenge just days before his scheduled execution.[9]

Even assuming, therefore, both that petitioner's recharacterized action could be treated as a "first" habeas petition and that the limitations period on that petition began to run from

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[9] Petitioner notes (Br. 31) that the Florida Department of Corrections had discretion to determine exactly how his execution would be carried out. For purposes of determining when petitioner's claim would become "ripe," however, there is no basis for presuming that the Florida Department of Corrections would deviate from the method disclosed in *Sims*. See J.A. 21 n.3 (noting, in complaint, that "[petitioner] can only assume that the Florida Department of Corrections has not changed [its] chemical process since the *Sims* opinion"). Similarly, a prisoner's claim more generally challenging execution by lethal injection would not be "unripe" simply because Florida *might* amend its statute at some point before the prisoner's execution occurred. There was no reason for petitioner to delay his challenge to the method in place.

the date that the basic protocol of Florida's method of execution became known in 2000, petitioner's action is patently untimely and thus barred under AEDPA.[10]

C. Even If Petitioner's Claim Is Cognizable In A Section 1983 Action, Petitioner Is Not Entitled To Relief

Finally, even if petitioner's method-of-execution claim is properly cognizable under Section 1983, petitioner cannot proceed with this action for two independent reasons.

1. As this Court noted in *Nelson*, "the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right." 541 U.S. at 649. In *Gomez* v. *United States District Court for the Northern District of California*, 503 U.S. 653 (1992) (per curiam), this Court considered a prisoner's claim, brought in an eleventh-hour Section 1983 action, that execution by gas chamber constituted cruel and unusual punishment. The Court noted that the prisoner had filed four prior habeas petitions and that he had "made no convincing showing of cause for his failure to

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[10] Petitioner alleges (Br. 8-9, 31) that Florida refused to disclose whether it would use the same succession of chemicals in his own execution. See J.A. 21 n.3 (alleging, in complaint, that, "[w]hile [petitioner] requested updated information from the defendants, such request was refused"). Even taking petitioner's allegation as true, however, it appears that petitioner waited until December 8, 2005, to seek confirmation from Florida concerning the procedures to be used in his execution—long after it became publicly known that Florida was using the succession of chemicals that petitioner now challenges.

In the lower courts, but not in his brief before this Court, petitioner relied on an article published in *The Lancet* in support of his contention that his action was timely. That article, however, at most constitutes *evidence* supporting petitioner's claim; it does not provide the "factual predicate" for that claim. See, *e.g.*, *Jurado* v. *Burt*, 337 F.3d 638, 644 (6th Cir. 2003); *Flanagan* v. *Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). Indeed, other prisoners had brought similar claims well before publication of the *Lancet* article. See, *e.g.*, *LaGrand* v. *Lewis*, 883 F. Supp. 469, 470 (D. Ariz. 1995), aff'd, 133 F.3d 1253 (9th Cir.), cert. denied, 525 U.S. 971 (1998).

raise [the method-of-execution] claim in his prior petitions." *Id.* at 653. The Court, however, ultimately did not decide whether the prisoner should have brought his claim in a Section 1983 action or a habeas petition. Instead, the Court noted that the prisoner was "seek[ing] an equitable remedy" and that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and [the prisoner's] obvious attempt at manipulation." *Id.* at 654. The Court observed that "[t]his claim could have been brought more than a decade ago" and that "[t]here is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Ibid.* On that basis, the Court vacated the court of appeals' stay of the prisoner's execution. *Ibid.* *Gomez* thus stands for the proposition that "there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson*, 541 U.S. at 650.

Consistent with *Gomez*, courts of appeals have frequently denied equitable relief on eleventh-hour method-of-execution claims. See, *e.g.*, *Rutherford*, 438 F.3d at 1089-1093; *White* v. *Johnson*, 429 F.3d 572, 573-574 (5th Cir. 2005); *Sapp*, 118 F.3d at 462-464. There is no justification for a different result here. For essentially the same reasons that petitioner's action would be untimely even if it were recharacterized as a "first" habeas petition, petitioner would not be entitled to equitable relief even if his action were properly brought under Section 1983. Because petitioner could have brought his method-of-execution claim at any point after Florida adopted lethal injection as its preferred method of execution and it became known that Florida intended to use the succession of three chemicals that petitioner now challenges, this case is directly analogous to *Gomez*. Moreover, petitioner was convicted of his capital offense more than 22 years ago, and long

ago completed his direct appeal and first rounds of state and federal collateral review. Because petitioner's action constitutes nothing more than a "last-minute attempt[] to manipulate the judicial process" (*Gomez*, 503 U.S. at 654), the lower courts correctly denied petitioner equitable relief.[11]

2. In addition, as this Court also noted in *Nelson* (541 U.S. at 650), the Prison Litigation Reform Act of 1995 (PLRA) prohibits an inmate from bringing a Section 1983 action concerning prison conditions until "such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). Petitioner concededly has not sought to exhaust any administrative remedies available within the Florida prison system. Instead, petitioner contended in his complaint only that it was not *necessary* for him to exhaust his administrative remedies because "the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." J.A. 17. As discussed above, however, it is clear that petitioner's claim was "ripe" by no later than 2000, when petitioner knew, or should have known, that Florida was using the succession of three chemicals that he now challenges. Petitioner's failure to exhaust his administrative remedies therefore constitutes yet another basis to uphold the lower courts' dismissal of this action.

The PLRA's exhaustion requirement is particularly important in this context. Where a prisoner challenges a particular method of execution *and* identifies an alternative, permissible method of execution (and so brings the claim within Section 1983), the exhaustion requirement affords the State

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[11] The Prison Litigation Reform Act of 1995, enacted after this Court's decision in *Gomez*, similarly specifies that, in deciding whether to issue preliminary or permanent injunctive relief in a Section 1983 action concerning prison conditions, "[t]he court shall give substantial weight[] to any adverse impact on * * * the operation of a criminal justice system caused by [any injunction]." 18 U.S.C. 3626(a)(1), 3626(a)(2).

an opportunity to consider whether the proposed alternative method would in fact be permissible. Moreover, if the identified alternative is feasible, federal-court involvement may be unnecessary. For example, if petitioner identified a higher dose of sodium pentothal that in his view would be sufficient, the State may have been able to accommodate that request. Here, of course, petitioner did not identify any alternative method of execution. The exhaustion requirement still would have permitted the State an opportunity to consider petitioner's claim. But more fundamentally, as discussed above, a prisoner's challenge to the method of execution employed by the State which does not identify any permissible, alternative method of execution is properly characterized as a challenge to his execution per se. That kind of challenge may be brought only in habeas.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 2006

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Supreme Court, U S
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No. 05-8794

In the
Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, ET AL
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. §1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. §2254.

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. §1983.

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INTEREST OF AMICI

The amici States all employ the death penalty as a means of punishing society's vilest offenders. Amici are keenly interested in ensuring that their capital sentencing schemes remain viable. Viability depends, in large part, on the States' ability to carry out duly-adjudicated death sentences in a timely manner. Eleventh-hour litigation like Hill's fatally frustrates that objective. Amici thus respectfully urge this Court to preclude death-sentenced inmates from filing last-minute execution-related claims - among them, challenges to the particular cocktail of chemicals that constitute a lethal injection - under the banner of 42 U.S.C. §1983. In so doing, this Court will both (i) enforce the carefully-crafted limitations that Congress has expressly written into the federal habeas corpus statute and (ii) honor the States' compelling interest in finality.

SUMMARY OF ARGUMENT

1. This Court should reject Hill's argument that §1983 is available because he is challenging only an execution "procedure," and not his execution *per se*. In the real world, there is no meaningful distinction between the two, and experience shows that an inmate can block an execution just as surely by challenging a "procedure" as by challenging his sentence directly. The story of David Larry Nelson, with whom this Court is familiar, is instructive. On remand from this Court's decision in *Nelson v. Campbell*, the State of Alabama took the challenged "cut-down" off the table as a means of accessing Nelson's veins and agreed, instead, to utilize Nelson's own preferred procedure, "percutaneous central line placement," which this Court had emphasized in allowing Nelson's §1983 claim to proceed. Although the State's concession should have - according to Nelson's own representations to this Court - led promptly to Nelson's execution, such was not to be the case. Instead, Nelson about-faced and, incredibly, attacked his own chosen

procedure as "cruel and unusual." To its consternation, the State continues to this day to litigate Nelson's (mutated) case in district court. The lesson of *Nelson* is simply this: Execution "procedures" are innumerable, and the incentive to muster and mount new (and even contradictory) challenges to those procedures as a means of delaying an impending execution is overwhelming. This Court's §1983 jurisprudence must account for that reality.

2. Hill's chemical-composition claim, had it been filed in a habeas corpus petition, would have been barred as "second or successive" within the meaning of 28 U.S.C. §2244(b)(2). That provision states expressly that a claim, like Hill's, that rests on a previously unavailable "factual predicate" may form the basis of a second habeas petition *only* if it implicates the petitioning inmate's actual innocence, which Hill's plainly does not. None of Hill's efforts to avoid §2244(b)(2)'s plain language is persuasive. *First*, it is not the case that any claim that might not have constituted an "abuse of the writ" under pre-AEDPA law cannot be deemed "second or successive" within the meaning of amended §2244(b)(2). Any such argument rests on the untenable premise AEDPA was just a blip, and that in comprehensively amending the habeas statute Congress merely sought to codify business as usual. *Second*, neither *Stewart v. Martinez-Villareal* nor *Slack v. McDaniel* salvages Hill's counter-textual argument. In both of those decisions, this Court - given the unique procedural circumstances involved - was able to permit claims to go forward without re-writing §2244(b)(2)'s clear text. Hill's broader contention, by contrast - that an inmate may file a second petition based solely on a new claim's newness, and even where his first petition was adjudicated on the merits - would break the camel's back. *Finally*, it is no answer to suggest that there might be some difference between (i) an inmate whose claim existed but was unavailable when he litigated his first habeas petition and (ii) one whose claim simply did not exist at that time. That distinction cannot be squared with §2244(b)(2)'s language, which (looking back to pre-AEDPA

law) encompasses petitioners in both situations and requires both to show innocence before proceeding. Nor does it comport with common sense; the equitable considerations pertinent to both petitioners are identical in that neither can be faulted for failing to raise his claim earlier.

3. Hill has not been denied a remedy here. The record makes clear that before rejecting Hill's Eighth Amendment claim the Florida Supreme Court considered it on the merits and in detail. This Court then reviewed and denied Hill's petition for a writ of certiorari pertaining to the Florida court's merits decision. Hill's *real* argument - that he is entitled, one way or another, to litigate his claim in federal district court - has been rejected before, and should be rejected again. In a line of decisions culminating in *Allen v. McCurry*, this Court has (i) emphasized that state courts are fully capable of adjudicating federal constitutional claims and (ii) rejected any suggestion that just because a constitutional claim is not cognizable on federal habeas, it must be cognizable under §1983.

ARGUMENT

"Obviously, a challenge to the chemicals used for lethal injection constitutes a challenge to the sentence of death by lethal injection." That was petitioner David Larry Nelson's position in *Nelson v. Campbell*, 541 U.S. 637 (2004). *See* Petitioner's Supplemental Cert. Reply Br. at 6. Indeed, Nelson's lawyer reiterated that position time and time again in this Court. *See, e.g.*, Oral Arg. Tr. 13-14 (Q: "[W]ould you be making the same argument [that §1983 is available] if his complaint was not this inch cut but the combination of chemicals?" A: "No, Your Honor."); *id.* at 14 (Q: "[W]hat is the difference between ... your using a drug that's going to hurt me and your using a catheter procedure that's going to hurt me?" A: "I think the primary difference, Justice Scalia, is that those are method of execution cases."). The point is not, of course, that Nelson's lawyer's representations are binding on anyone here. The point is simply that there was

a time, not too long ago, when participants on both sides of the debate agreed precisely how the question presented in *this* case should be resolved - namely, against §1983 review.

The amici States are gravely concerned that this case represents a second step (*Nelson* being the first) along a road to allowing all manner of execution-related challenges to proceed via §1983 - at the cost of the finality interests that the federal habeas corpus statute is designed to protect.

Amici will address three issues: (i) the fallacy that there is, in the real world, any meaningful difference between a challenge to an execution "procedure" and a challenge to the execution itself; (ii) the notion that Hill's claim here, had it been presented in a habeas petition, could have been anything but "second or successive"; and (iii) the suggestion, which underlies Hill's entire position, that, one way or another, he is entitled to an unencumbered opportunity to litigate his Eighth Amendment claim in federal district court.

I. David Larry Nelson: The Rest of the Story

Writing for 30 States in *Nelson*, the State of Ohio predicted that if this Court were to allow the §1983 suit there to go forward, "it is reasonable to assume that virtually all death-sentenced prisoners will be citing the '*Nelson* exception' as grounds for eleventh-hour stays." Br. of Ohio and 29 Other States at 15. This case bears out that prophecy. Hill's brief cites *Nelson* more than 50 times, says that the §1983 complaint here was "modeled on the one this Court approved" in *Nelson* (Hill Br. 2) and that this case "is on all fours with" *Nelson* (Hill Br. 13), and finally asserts that *Nelson* "requires reversal of the Eleventh Circuit's decision" (Hill Br. 12).

It is not so much the fact that Hill invokes *Nelson*, but rather the basis on which Hill invokes *Nelson*, that should interest the Court. Time and again, Hill insists that he is challenging only "the particular procedures" that Florida intends to use to execute him, and he purports to "concede[] that other methods of lethal injection the [State] could

choose to use would be constitutional." Hill Br. 17. Thus, Hill says, "[s]hould he prevail, the State would remain free to carry out his execution using more humane (and constitutional) lethal injection procedures." *Id.* at 3; *see also id.* at 12 (execution may proceed by "different means"); *id.* at 20-21 (same); *id.* at 22 ("different approach[]").

The "it's-just-a-procedure" move is to be expected. By so pleading, Hill seeks to bring his claim in line with that of Nelson, who, Hill says, also "conceded that other procedures for gaining [venous] access were constitutional." Hill Br. 20. Indeed, Nelson went so far as to suggest an alternative procedure that might be used to gain venous access in lieu of the challenged "cut-down," namely, "percutaneous central line placement." J.A. 17 (Complaint ¶63), *Nelson* (No. 03-6821). That procedure, Nelson said in his complaint, is "less invasive, less painful, faster, cheaper, and safer" than the cut-down and, further, "meets the contemporary standards of medical care" and thus "does not violate [Nelson's] Eighth Amendment rights." *Id.* at 17, 19 (¶¶65, 68, 78). Nelson made similar representations to this Court. Among them: (i) that he was "not trying to block his execution"[1]; (ii) that he did not "object to lethal injection" *per se*[2]; and (iii) that he had "no objection" to the percutaneous central line procedure.[3] The bottom line, according to Nelson, was that if the State would "concede that percutaneous line placement would be an acceptable method" of obtaining venous access, "then yes," "*[t]hat's all we were seeking.*"[4] Thus, Nelson asserted, "if, in the end, he is permitted to proceed in federal court and there obtains a favorable adjudication of his Eighth Amendment claim" challenging the cut-down procedure, "the immediate result will be to let the State execute him and thus accomplish its

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[1] Oral Arg. Tr. 6.

[2] *Id.* at 18.

[3] *Id.* at 17.

[4] *Id.* at 60 (emphasis added).

ultimate objective as well." Br. for Petitioner, *Nelson* (No. 03-6821).

Nelson's concessions were central to this Court's decision. The Court emphasized that "[i]f as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself" and thus preclude §1983 review. 541 U.S. at 645. As it was, though (or seemed, anyway), Nelson had agreed to an alternative procedure - *i.e.*, percutaneous central line placement - that, if used, would "allow[] the State to proceed with the execution ...." *Id.* at 646. Echoing the "necessar[y] impl[ication]" standard of *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court held that because it would not "*necessarily* prevent Alabama from carrying out its execution" by other means, Nelson's challenge to the cut-down could proceed under §1983. 514 U.S. at 647.

But if ever a case proved the truth of Holmes' dictum that the life of the law is not logic (here, in the "necessar[y] impl[ication]" sense) but experience,[5] Nelson's is it. To its great consternation, the State of Alabama *continues to this day* to litigate Nelson's §1983 action in district court. Because the postscript to this Court's decision in *Nelson* sheds important light on the practicalities of the situation that Hill's case presents - and because we fear that Nelson's case is indicative of a larger and growing trend - we relate Nelson's story here in some detail. At the risk of killing the suspense, we will summarize the storyline briefly up front. Not to put too fine a point on it, Nelson's lawyers (i) reneged on the various representations they had made to this Court, (ii) challenged as "cruel and unusual" the very execution procedure they had suggested to this Court as a viable alternative, and (iii) to this point, anyway, seem to have

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[5] *See* Oliver Wendell Holmes, *The Common Law* 1 (1881).

gotten away with it. The tale of Nelson's machinations and manipulations is part tragedy, part farce.

A. A Cautionary Tale

True to its word,[6] the State of Alabama, on remand from this Court's decision, took the cut-down procedure off the table as a means of gaining access to Nelson's veins and agreed to proceed either on the basis of a simple peripheral needle stick or, failing that, according to Nelson's own preferred method - percutaneous central line placement. The colloquy that occurred during an initial status conference in the district court bears repeating at some length because it contains the seeds of the "mutation" of Nelson's claim. To start, the district court judge (Hon. Myron H. Thompson) asked counsel, "Can we all agree ... that the cutdown procedure will not be used?" Three times the State's lawyer answered, "Yes, your Honor," to which Judge Thompson responded: "I'm ordering it today. The cutdown procedure cannot be used by agreement of the parties."[7] Asked then by Judge Thompson, "What procedure will be used?" the State responded that "[a] peripheral vein will be accessed, and if that's not successful then a central line procedure will be used."[8] With that assurance - that the State intended to proceed according to Nelson's own chosen protocol - Judge Thompson inquired, "Isn't this case over now?" The State, not surprisingly, answered "Yes, sir."[9]

Nelson's lawyers answered "No."[10] When Judge Thompson asked "Why not?" Nelson's lawyers said that

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[6] *Nelson*, 541 U.S. at 646 (quoting State's agreement that "'percutaneous central line placement is the preferred method'" and observing that "the State now seems willing to implement petitioner's proposed alternatives").

[7] Hearing Tr. 6-7, *Nelson v. Campbell*, No. 2:03-CV-1008-T (Oct. 6, 2004).

[8] *Id.* at 7.

[9] *Id.* at 11.

[10] *Id.* at 11.

they believed that Nelson was "entitled under the Eighth Amendment to a detailed description of how [the State] plan[ned] to proceed."[11] Specifically, Nelson's lawyers – walking away from their earlier representation to this Court that "all [they] were seeking" was an injunction against the cut-down[12] – demanded to know "who is going to do [the central line procedure], where it's going to be done and what [are] the qualifications of the people who are going to perform the surgery."[13] Perplexed,[14] Judge Thompson asked "Why can't we just enter an order today that says by agreement of the parties the only procedures that will be used are ... peripheral venous access; and, if unsuccessful, then central line procedure also known as subclavian venous access? ... What's wrong with that order being entered today, case dismissed?"[15] Addressing Nelson's lawyers, Judge Thompson continued:

> You know, I have given you an opportunity to come up with the options. You said this was an option. You said it was one that you could live with. Why don't we just reduce this to a court order? *This is your protocol reduced to a court order.* That's it. What's wrong with that?[16]

Even as Judge Thompson emphasized that "[e]veryone is agreed now" and that "[w]e're agreeing with you around the board," Nelson's lawyers reiterated their new demands.[17] Specifically, they said, they "want[ed] ... a step-

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[11] *Id.* at 11.

[12] Oral Arg. Tr. 60, *Nelson* (No. 03-6821).

[13] Hearing Tr. 8, *Nelson*, No. 2:03-CV-1008-T (Oct. 6, 2004).

[14] *See id.* at 13 ("I'm not following you."); *id.* at 14 ("I don't understand.").

[15] *Id.* at 12.

[16] *Id.* at 12-13 (emphasis added).

[17] *Id.* at 14. Notably, these new objections were based in large part on Nelson's lawyers' repeated representations to Judge Thompson that their own central-line protocol entailed "a surgical procedure." *Id.*; *see also id.* at 8 ("[T]hat's what it is, it's surgery."). But that, too, contrasts starkly with

by-step procedure."[18] Judge Thompson cut them off mid-sentence:

> But if we do that, all you're going to do is come back and say well, they didn't tell us what step 2A will be and what step 2B [will] be when we didn't know you needed step 2A and 2B.
>
> *Cough up now or shut up.* Now tell me now what it is that you want. If you want to know who will do the procedure, if you want to know how it will be done, then ask for that now.[19]

Nelson's lawyers persisted: "We want to know who is going to do it, where they're going to do it, and what their qualifications are."[20]

When, in response, the State assured Judge Thompson that "if a central line procedure is necessary, then a doctor, a medical doctor is available to perform that procedure," one of Nelson's lawyers parried with yet another new objection: "[J]ust a general M.D., as far as I know, is not adequate" because, he now claimed, "[p]ercutaneous central line placement is a specialty ... that lots of doctors have never performed."[21] Thus, he said, "If it's somebody who is experienced in subcutaneous placement, then that's what we

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what they told this Court. Asked point blank by Justice O'Connor during oral argument whether percutaneous central line placement "require[s] a cut as well," Nelson's lawyer answered: "No, ma'am. It ... would just require ... a needle, a hollow needle, with a wire inside. ... It wouldn't require the kind of incision and all of the kind of auxiliary support systems." Oral Arg. Tr. 17.

[18] Hearing Tr. 16, *Nelson*, No. 2:03-CV-1008-T (Oct. 6, 2004).

[19] *Id.* (emphasis added).

[20] *Id.*

[21] *Id.* at 16-17. Again, inconsistencies abound: In challenging the cut-down and purporting to embrace central line placement, Nelson's original complaint said of the latter procedure: "Because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure." J.A. 17 (¶66), *Nelson* (No. 03-6821).

want."[22] Even when the State *further* assured Judge Thompson that its doctor "is experienced at performing procedures for intravenous access" and "has performed many central line procedures," Nelson's lawyers continued to dissemble.[23] At that point, Judge Thompson, obviously and understandably frustrated, decided to refer the entire matter to an independent medical expert.[24] *And at that point, of course, Nelson effectively won.* His lawyers had successfully managed to turn the case on its head, attack their own suggested procedure (the very procedure that this Court underscored as the basis for its decision allowing the §1983 suit to proceed), and delay indefinitely Nelson's scheduled execution.

On the heels of the status conference, the State moved to dismiss Nelson's §1983 complaint. In short, the State contended (i) that Nelson's complaint challenged only one procedure, the cut-down; (ii) that the State had expressly agreed not to use the cut-down and to proceed instead according to Nelson's own chosen protocol, which called for gaining venous access using, if necessary, a percutaneous central line procedure; and, therefore, (iii) that Nelson's Eighth Amendment claim was moot. *See* Motion To Dismiss, *Nelson*, No. 2:03-CV-1008-T (Oct. 29, 2004).

Six months later, Judge Thompson convened another status conference. At the hearing, the State objected to further proceedings on the ground that Nelson had not responded to, nor had Judge Thompson ruled on, the State's motion to dismiss.[25] Judge Thompson responded that "the reason I set this procedure up" - that is, of referring the case to a medical expert - "was so that I could rule on" that motion, because "I didn't know what the percutaneous

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[22] *Id.* at 17.

[23] *Id.* at 17-18.

[24] *See id.* at 19-20.

[25] Hearing Tr. 5, *Nelson*, No. 2:03-CV-1008-T (Apr. 12, 2005)

subclavian central line procedure is."[26] While acknowledging that it "underst[ood Judge Thompson's] position," the State said that it "would have to insist on a ruling."[27] The reason, the State explained, was that Nelson's §1983 complaint "contains allegations about just one procedure, and it's not anything about a central line procedure, it's about a cutdown procedure," which, of course, had been eliminated as a possibility. "[T]he lawsuit," the State pointed out, "seems to be kind of taking on new allegations."[28]

On the latter point, Judge Thompson agreed that "now that I think about it, you may be correct." But instead of dismissing Nelson's cut-down based complaint, Judge Thompson said that "[i]t may be that the plaintiff needs to further modify his complaint to make clear exactly what he's alleging."[29] Nelson's lawyers jumped at the chance. They said that they would "certainly be happy to" amend the complaint to the challenge the central-line procedure, which they subsequently did, thus formalizing their switcheroo.[30]

Nelson's amended complaint is astonishing - and eye-opening. Its allegations challenging central line placement (again, Nelson's own chosen procedure) echo, essentially verbatim, those that Nelson had earlier leveled at the cut-down. Indeed, Nelson's amended complaint proceeds in lockstep fashion to parrot the allegations of the initial complaint - only training them on the central line procedure - *for twenty straight paragraphs*. We have attached a revealing blow-by-blow comparison of the two as an appendix to this brief. But there are two highlights worth mentioning here because they so clearly unmask Nelson's lawyers' maneuvering and point up the problem with death-row

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[26] *Id.*

[27] *Id.* at 5-6.

[28] *Id.* at 6.

[29] *Id.*

[30] *Id.* at 9.

inmates' now-standard "it's-just-a-procedure" line. First, Nelson's amended complaint asserts that *precisely the same complications* would attend the use of percutaneous central line placement as would (his original complaint said) have accompanied the cut-down. In fact, the two complaints describe the supposed complications in *identical terms*:

> These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity in the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia).

J.A. 14 (¶49), *Nelson* (No. 03-6821) (cut-down); Second Amended Complaint ¶112, *Nelson*, No. 2:03-CV-1008-T (Apr. 22, 2005) (percutaneous central line placement). It is of course inconceivable that the two procedures - the cut-down, on the one hand, and Nelson's own percutaneous central line placement, on the other - could actually risk *exactly* the same complications. Nelson's lawyers were simply saying what they needed to say - and being none too coy about it - to keep the case alive and to keep Nelson's execution from going forward.

There is a second revealing juxtaposition. Paragraph 125 of Nelson's amended complaint (attacking the central line procedure) asserts that "[i]f the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing *adequate safeguards*, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution." *Id.* ¶125 (emphasis added). In his original complaint, Nelson had made exactly the same allegation, but with an important twist: "If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied

or mitigated by employing *alternative methods or altering the procedures employed in the execution process*, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution." J.A. 16 (¶61), *Nelson* (No. 03-6821) (emphasis added). The "alternative method[]" or "alter[ed] procedure[]" to which Nelson's original complaint referred was - of course - percutaneous central line placement. Indeed, Nelson's original complaint spent the next six paragraphs extolling the virtues of that procedure, concluding with the statement that percutaneous central line placement "meets contemporary standards of medical care." *Id.* at 17 (¶¶62-67). Despite the otherwise perfect parallelism between the original and amended complaints, those six paragraphs are conspicuously absent from the amended version. *See* Second Amended Complaint, *Nelson*, No. 2:03-CV-1008-T (gap between ¶¶125 and 126). The reason, of course, is that the original complaint endorsed percutaneous central line placement as an humane alternative; the amended complaint attacks that same procedure as "cruel and unusual."

The State promptly moved to dismiss Nelson's amended complaint, pointing out not only the obvious - that Nelson was now challenging as unconstitutional the very procedure that he had earlier touted as an acceptable alternative - but also that he was challenging central line placement *on the very same grounds that he had challenged the cut-down*. *See* Motion To Dismiss Second Amended Complaint at 5, *Nelson*, No. 2:03-CV-1008-T (May 4, 2005). Regrettably, given Nelson's lawyers' baiting and switching, the State was left to draw only one conclusion: "that Nelson's previous representations to [the district court], the Eleventh Circuit, and the Supreme Court were a ruse and that Nelson's attorneys' sole motivation is to delay or stop the State from carrying out Nelson's lawfully imposed death sentence." *Id.* at 7. "As it turns out," the State observed, Nelson's §1983 suit "is, as the State has said all along, a challenge to [his] death sentence itself." *Id.* at 7-8.

Two years after this Court's decision in *Nelson*, which by all accounts should have brought about a speedy resolution of the litigation, the State's motion to dismiss remains pending in district court.

B. The Takeaway

1. So what's the moral to the story? Not that Nelson's lawyers are bad people; they have a client to defend, and they are defending him. The moral, instead, is simply that in the hurly burly of capital litigation - where claims mutate and targets move - logical postulates (*e.g.*, that X "necessarily impl[ies]" Y) often don't do the trick. The fact that a particular execution-related challenge - like Nelson's or Hill's - might, in some theoretical sense, be separable from the execution itself simply cannot be the test of §1983's applicability. As Nelson's case demonstrates, there can always be - and often will be - new challenges to new execution "procedures." The hydraulic pressure to muster and mount such challenges is overwhelming. And, of course, the nature and variability of those challenges are limited only by a condemned inmate's lawyer's imagination. If it's not the cut-down, it's the central line. If it's not this combination of chemicals, it's that combination. Or perhaps it's the length or width of the needle, the particular area of the body into which the State proposes to insert that needle,[31] the type of restraints on the gurney, or the qualifications of the attending medical personnel.[32] We are

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[31] *See, e.g.*, Hill Br. 7 (citing *Baze v. Rees*, No. 04-CI-01094 (Ky. Cir. Ct. July 8, 2005), *pending on appeal, Rees v. Baze*, No. 2005-SC-000543 (Ky. Sup. Ct.), as holding unconstitutional "lethal injection into the jugular vein of the neck of the condemned prisoner"); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, at 6 (W. D. Mo. Jan. 31, 2006) (challenge to use of femoral artery).

[32] As shown by recent events in California, by demanding that a doctor be present, a death-sentenced inmate can effectively forestall his execution. *See, e.g.*, Louis Sahagun & Henry Weinstein, *California Calls Off Execution*, L.A. Times (Feb. 22, 2006); *see also, e.g., Taylor*, No. 05-4173-CV-C-FJG, at 7 (inmate insisting that doctor be present and then asserting that no doctor can ethically participate).

not being flippant or crass. Our point is that a death-sentenced inmate has every incentive - however natural that incentive may be - to delay his execution by whatever means necessary. The law, if it is to have any footing in reality, must take account of that fact.

Along these lines, it is important to point out that the line drawn in *Nelson* between "wholly unnecessary" or "gratuitous" execution procedures, on the one hand, and "necessary" ones, on the other - the former, but probably not the latter, being challengeable under §1983 - does nothing to ameliorate the problem. *Nelson*, 541 U.S. at 645-46. The reason, of course, is that there is no such thing as a strictly, technically, scientifically *necessary* execution procedure. There is, to be blunt, always some other way to carry out the execution. In *Nelson*, a cut-down was deemed unnecessary because other methods of obtaining venous access - among them, percutaneous central line placement - were available. But just as surely, percutaneous central line placement is not technically necessary to accomplishing a lethal injection; there are any number of other ways by which venous access can theoretically be established, even for an inmate, like Nelson, with compromised veins.

So, too, here. No particular cocktail of chemicals is strictly *necessary* to a lethal injection - as indicated, for starters, by the fact that different States use different cocktails. The number of available chemical-composition variations - not only the use of different doses of the traditional drugs sodium pentothal, pancuronium bromide, and potassium chloride, but also the use of entirely different drugs (*e.g.*, morphine) - is literally infinite. There is, as best we can tell, no limiting principle to an "unnecessary-ness" criterion. Of course, we don't point all of this out for the purpose of advocating that all chemical-composition (and, for that matter, all other execution-related) challenges be swept into the rule articulated in *Nelson*. Quite the contrary, we urge the Court to take notice of the real-world facts (i) that technically unnecessary execution "procedures" are innumerable and (ii) that a death-sentenced inmate can stop

an execution just as surely by challenging an execution "procedure" as by challenging the fact of his conviction or sentence itself.

2. In any event, if ever there was a challenge to an execution "procedure" so bound up with a challenge to the sentence itself as to be indistinguishable, this is it. *Nelson*, admittedly, involved a procedure (the cut-down) that was one small step removed from the administration of the lethal injection itself. Here, by contrast, the challenge is to the very substances that constitute that injection. Under *Heck v. Humphrey* and its progeny, Hill's claim may not proceed under §1983.

This Court has made clear that *Heck*'s "necessar[y] impl[ication]" standard should be applied functionally, not formalistically. In *Heck* itself, the Court characterized its holding as reaching beyond claims of "unconstitutional conviction or imprisonment" to encompass, as well, allegations of "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." 512 U.S. at 486-87. The Court thus clarified that *Heck*'s limitations on §1983 actions extend beyond unvarnished, frontal assaults on convictions and sentences *per se*. Rather, those limitations apply as well – as they must in the real world – to claims that, though perhaps not "directly attributable" to a conviction or sentence, *see id.* at 487 n.6 nonetheless necessarily affect the conviction's or sentence's validity.

In *Edwards v. Balisok*, 520 U.S. 641 (1997), this Court's emphasis on functional reasoning was even more apparent. There, the Court pointed to *Heck*'s "other harm" language in expressly embracing a practical, functional approach to the question whether a given §1983 claim "necessarily impl[ies]" the invalidity of a conviction or sentence. Balisok had filed a §1983 action alleging that the procedures utilized in a prison disciplinary hearing at which he was deprived of good-time credits violated due process. Like Hill here, Balisok insisted that his challenge was concerned solely with "procedures," and *not* with his ultimate sentence or punishment. *See, e.g.*,

Br. for Resp. at 6, 7, 8, 16, *Balisok* (No. 95-1352). As this Court summarized Balisok's claim, it "posited that the procedures were wrong, but not necessarily that the result was." 520 U.S. at 645. The Ninth Circuit had adopted a formalistic rule that a claim challenging procedures would *never* "necessarily imply" a punishment's invalidity within the meaning of *Heck* and thus was "always cognizable under §1983." *Id.* at 644.

In reversing, this Court unanimously rejected the Ninth Circuit's bright-line rule sanctioning all §1983-based challenges to disciplinary-hearing "procedures." Instead, the *Balisok* Court concluded that while some challenges to procedures will not run afoul of *Heck*, others certainly will. That determination, this Court emphasized, will depend on "the nature of the challenge to the procedures" and whether, in a particular case, the procedural challenge is "such as necessarily to imply the invalidity of the judgment." *Id.* at 645. And, indeed, this Court held that several of Balisok's challenges, although ostensibly aimed solely at the procedures employed, not at the punishment imposed, *did* "necessarily imply" the invalidity of his punishment within the meaning of *Heck*, and were therefore not cognizable under §1983.

Balisok's functional reasoning applies precisely to this case. Like Balisok, Hill insists that he is not attacking his death sentence *per se*, but is instead challenging only a "procedure" used to administer that sentence. That procedural challenge, he says, may proceed under §1983, without regard to the rules governing habeas corpus practice. What Hill apparently seeks in this case is a Ninth-Circuit-like rule that a challenge to an execution "procedure" can *never* amount to a challenge to the execution itself. But that is just the sort of wooden formalism that this Court rejected in *Balisok*. It is the "nature of [Hill's specific] challenge," *id.* at 645, that determines whether his §1983 claim is foreclosed by *Heck*. Viewed functionally, as *Balisok* shows it should be, it is clear that Hill's claim is barred. Just as *Balisok* demonstrates that the

legal relationship between a particular "procedure" and a sentence can be such that a challenge to the former is tantamount to a challenge to the latter, so, too, the *factual* relationship between the three-chemical "procedure" that Hill attacks (Hill Br. 6) and his death sentence - the former being the very substance of the latter - exposes Hill's challenge as one directed to his sentence.

II. Hill's Challenge, If Presented in a Habeas Petition, Would Be Barred as "Second or Successive" Under AEDPA.

Hill contends that even if his §1983 complaint were recharacterized as a habeas corpus petition, it would not be subject to dismissal under 28 U.S.C. §2244(b) as "second or successive" - even though, he freely admits, he has already litigated one habeas petition to conclusion. *See* Hill Br. 29-36. We respectfully disagree.

First, a bit of background. As this Court has observed, "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, *particularly in capital cases.*" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (emphasis added). Specifically, Congress sought "to curb the abuse of the statutory writ of habeas corpus" and, thereby, to "address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944. In signing AEDPA, President Clinton lamented that "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served." Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996). The point of AEDPA, the President emphasized, was to "streamline Federal appeals for convicted criminals sentenced to the death penalty." *Id.*

One of the principal means by which Congress sought to "streamline" the appeals process was by severely restricting inmates' ability to file "second or successive" habeas petitions. 28 U.S.C. §2244(b). Section 2244(b)(1) requires

dismissal, without exception, of any claim raised in a second or successive petition that "was presented in a prior application." With respect to so-called "new claim" petitions - second or successive petitions raising claims, like Hill's Eighth Amendment claim here, that were "*not* presented in a previous application" - §2244(b)(2) requires dismissal save in two narrow circumstances. Specifically, Congress determined that an inmate may file a new-claim successive petition only:

- where the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (§2244(b)(2)(A)); or

- where *both* (i) the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* (ii) the facts underlying the claim establish by clear and convincing evidence that the inmate is actually innocent (§2244(b)(2)(B)).

Hill claims here that he should not be subject to §2244(b)(2)'s bar because his Eighth Amendment claim - challenging the administration of Florida's lethal-injection statute, which was not enacted until January 14, 2000 - was "unripe" and "had no factual or legal predicate" at the time he was litigating his first habeas petition. Hill Br. 34; *see also id.* at 13 (same).[33] To be clear, Hill does *not* now contend that he qualifies under §2244(b)(2)(B)'s exception for claims that rest on a "factual predicate" that "could not have been discovered previously through the exercise of due diligence." And with good reason; in addition to requiring a previously unavailable "factual predicate," §2244(b)(2)(B) requires a petitioner to show that his claim implicates his

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[33] This Court denied certiorari respecting the Eleventh Circuit's affirmance of the district court's denial of Hill's habeas petition on January 10, 2000. *See Hill v. Moore*, 528 U.S. 1087 (2000).

actual innocence of the charged offense, a showing Hill cannot make. Instead, Hill contends that because the "predicate" for his claim was unavailable to him when he litigated his first habeas petition, his current claim is not "second or successive" at all.

There is, respectfully, a fundamental problem with Hill's argument: Although it purports to deal only with §2244(b)'s "second or successive" triggering condition and not with the operation of the statutory exceptions, it nonetheless ends up reading §2244(b)(2)(B)'s express actual-innocence limitation right out of the statute. The statute, to repeat, says that a petitioner may raise a claim based on a new "factual predicate" if, but only if, he can also make a clear and convincing showing of actual innocence. Hill says, quite differently, that a petitioner ought to be able to raise a claim based on a new predicate *simply because of the claim's newness* - wholly without regard to the claim's relationship to the petitioner's innocence. Under any fair reading of §2244(b)(2)(B), that cannot be.

Without coming right out and acknowledging the problem, Hill offers several solutions to it. None is persuasive.

1. It is not true, as Hill suggests (Hill Br. 33-35), that because his challenge might not have constituted an "abuse of the writ" under pre-AEDPA law, it cannot be deemed "second or successive" within the meaning of §2244(b)(2)(B). In essence, Hill's contention here is that AEDPA was just a blip - that Congress was satisfied with existing habeas practice and content simply to codify business as usual. But that is not so. In support of this what's-old-is-new interpretation, Hill quotes *Felker v. Turpin*, 518 U.S. 651 (1996), for the proposition that "[t]he new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" Hill Br. 33. But that passage merely indicates that §2244(b) is aimed, generally, at the same sort of problem - repetitive filings - targeted by the old abuse-of-the-writ doctrine. It does *not* suggest that what constitutes abuse, or

that the response to abusiveness, is the same now as before AEDPA. And, indeed, other language in *Felker* - found just before and just after the quote that Hill excerpts - makes clear that in enacting AEDPA Congress was *not* just treading water. This Court specifically referred there to "[t]he *added restrictions* which the Act places on second habeas petitions" and observed that while AEDPA "codifies some of the pre-existing limits on successive petitions," it also *"further restricts* the availability of relief to habeas petitioners." 518 U.S. at 664 (emphasis added); *see also See* Henry Hart & Herbert Wechsler, *The Federal Courts and the Federal System* 1386 (Richard Fallon, *et al.*, eds., 5th ed. 2003) ("In 1996, Congress amended §2244(b) to further restrict federal court power to entertain successive petitions.").

One of the country's leading death-penalty lawyers accurately summed up these "added" and "further" restrictions imposed by AEDPA's stringent second-petitions bar like this: "As a general matter" in the pre-AEDPA days, "any type of claim that was unavailable at the time of the earlier filing - because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner - was an appropriate candidate for inclusion in a successive petition." Bryan Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 736 (2002). "AEDPA's successive petition standard," he explained, "appears to incorporate this general approach, *but with one major difference.*" *Id.* at 737 (emphasis added). Specifically, and as particularly relevant here, "Subsection 2244(b)(2)(B)(ii) sharply diverges from [the] prior law ... by modifying the 'new facts' category to include an additional requirement that the prisoner make a showing of 'innocence.'" *Id.* at 737-38.

In other words, before AEDPA's enactment, a new claim could be presented in a second petition on a showing *either* (i) that cause existed to excuse the failure to present the claim earlier - for instance, the "unavailability of the factual basis for the claim" at the time the first petition was filed - *or*

(ii) that the petitioner was likely to be "innocent of the crime." *McCleskey v. Zant*, 499 U.S. 467, 494-95, 497 (1991); *see also* 2 Randy Hertz & James Leibman, *Federal Habeas Corpus Practice and Procedure* §28.3e, at 1454 (5th ed. 2005) ("proof of either 'cause and prejudice' or an innocence-focused variety of 'manifest miscarriage of justice'"). New §2244(b)(2)(B), by contrast, expressly tightens the second-petition standard by requiring a habeas petitioner to show *both* (i) a newly-discovered factual predicate *and* (ii) probable actual innocence. *See id* (explaining AEDPA's shift from a disjunctive cause-or-innocence standard to a conjunctive "cause and innocence" standard); Hart & Wechsler, *supra*, at 1386 (AEDPA "narrows the prior standards" by requiring that a second petition "satisfy both of two conditions (under *McCleskey*, they were essentially alternatives")).

No one, to our knowledge, has ever suggested that this conspicuous shift from an "either-or" standard to a "both-and" standard was the result of oversight. And, indeed, given all of the clamor about "reduc[ing] delays," "curb[ing] ... abuse," and "streamlin[ing] ... appeals" that accompanied AEDPA's passage (*see supra* at 18), it seems inconceivable that §2244(b)(2) is anything less than Congress' conscious design to punch-up the old abuse-of-the-writ doctrine and tighten the second-petition standards. Accordingly, the argument that underlies Hill's position here - that Congress could not possibly have intended to preclude second habeas petitions that raise new claims that, though not implicating actual innocence, are based on a factual or legal predicate not available at the time the first habeas petition was adjudicated - provokes a straightforward response: That is *precisely* what Congress intended, and it is virtually impossible to read §2244(b)(2) - particularly in the light the clear rejection of business as usual - any other way.

We should add that Congress' determination to limit §2244(b)(2)(B)'s reach to claims that (unlike Hill's) implicate an inmate's actual innocence is not only crystal clear, but also eminently reasonable. It appropriately tempers the

traditional habeas concerns of federalism, comity, and finality with a heightened solicitude for one uniquely compelling circumstance: an inmate's showing that he is actually, factually innocent - *i.e.*, that he didn't do it. *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998) ("AEDPA's central concern" is "that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."); *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence.").

In *Lonchar v. Thomas*, this Court emphasized that , when it comes to prescribing the appropriate scope of habeas corpus, "balanc[ing] the relevant competing interests" is primarily a task for Congress, not the courts. 517 U.S. 314, 328 (1996). By enacting AEDPA - which, as relevant here, amends §2244(b)(2) - Congress struck a new and different "balance" concerning repetitive petitions. There is no basis for upsetting that balance now.

2. Contrary to Hill's suggestions (Hill Br. 29-33), neither *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), nor *Slack v. McDaniel*, 529 U.S. 473 (2000), salvages his counter-textual argument. At issue in *Martinez-Villareal* was a habeas petition presenting a "competency-to-be-executed" claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). The condemned inmate had raised his *Ford* claim in a prior habeas petition, but the district court had "dismissed [the claim] as premature ... because his execution was not imminent and therefore his competence to be executed could not be determined at that time." *Martinez-Villareal*, 523 U.S. at 644-45. After the State had obtained an execution warrant, the inmate moved the district court to reopen his earlier-filed *Ford* claim. Based on AEDPA's successive-petitions bar, the district court refused. The Ninth Circuit reversed, seemingly on the broad ground that because, almost by definition, a *Ford* claim will not arise until after the first round of habeas litigation, AEDPA's successive-petitions bar "does not apply to a petition that raises only a

competency to be executed claim." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 629 (9th Cir. 1997).

This Court affirmed but "on a much narrower ground than the appellate court had employed." Stevenson, *supra*, at 744. Whereas "the Ninth Circuit [had] essentially read into the statute an exemption for *Ford* claims," this Court "avoided deciding the broad issues in the case." *Id.* at 742, 747. This Court held only that the inmate there had not filed a "second or successive" habeas petition at all but, instead, had simply moved to reopen his *first* petition. *See Martinez-Villareal*, 523 U.S. at 643 ("There was only one application for habeas relief ...."). The Court concluded that in that unique situation, where a habeas petitioner moves to reopen an earlier-filed petition to obtain an initial merits determination of a previously-unripe claim, AEDPA poses no bar. The Court expressly did *not* adopt a broad-ranging exception to §2244(b)(2)'s successive-petitions bar for all claims that, for whatever reason, could not have been raised in a first petition. *See id.* at 645 n.*.

Neither *Martinez-Villareal* nor its successor, *Slack*, can be stretched to encompass Hill's case. Again, the numerically second petition in *Martinez-Villareal* was deemed a first petition because the petitioner there had moved to reopen a previously-filed claim. In *Slack*, a numerically second petition was deemed a first only because the actual first petition had been dismissed on exhaustion grounds and, thus, could be treated "as though it had not been filed." 529 U.S. at 488. Neither special circumstance applies here. Hill is not moving to reopen an earlier-filed claim; and because his first petition was denied on the merits, not for failure to exhaust or for some other technical deficiency, it cannot be deemed a non-event. There simply is no amount of massaging that could make Hill's challenge anything other than "second or successive."

Some have argued that this Court's decisions in *Martinez-Villareal* and *Slack* themselves so narrowly construe AEDPA's second-petition provisions as to "deviat[e] from statute's plain language." Hertz & Leibman, *supra*, §28.3e, at

1463. We needn't go so far today. By training very specifically on the unique procedural circumstances presented in those cases, this Court was, at least arguably, able to permit the claims there to go forward and still remain faithful to §2244(b)(2)'s text. But there should be no mistake: The much broader proposition urged by Hill in this case – that an inmate may file a second petition based solely on a new claim's newness, and even where his first petition was adjudicated on the merits – is irreconcilable with any fair reading of the statutory language. Even, that is, if *Martinez-Villareal* and *Slack* didn't break the camel's back, acceptance of Hill's more sweeping argument would.

3. Finally, and importantly, it is no answer to say that there may be a difference, for §2244(b)(2) purposes, between (i) a claim whose factual predicate existed but was unavailable at the time the first habeas petition was litigated and (ii) a claim whose factual predicate simply did not exist at the time the first habeas petition was litigated. Hill's claim, we acknowledge, is of the second variety, given that Florida did not adopt lethal injection as its principal method of execution until shortly after Hill's first habeas petition was finally adjudicated. But under AEDPA (and the history that led to that statute's adoption) the distinction is immaterial.

Hill has not made it, but one could imagine an argument positing that claims in the former category cannot proceed absent a showing of innocence in compliance with §2244(b)(2)(B), while claims in the latter are free of the statute's innocence limitation. But that argument cannot be squared either with AEDPA's plain language, with pre-AEDPA abuse-of-the-write doctrine, or with common sense. As for text, §2244(b)(2)(B) is written broadly and generically to require a habeas petitioner to demonstrate innocence whenever he raises any claim whose "factual predicate ... could not have been discovered previously through the exercise of due diligence." That language clearly reaches both categories of claims described above; whether a claim's factual predicate was existent but unavailable or simply

non-existent, it is one that "could not have been discovered previously through the exercise of due diligence." There is no basis for reading the statutory language to apply only to the first category.

What is more, §2244(b)(2)(B)'s language - covering any claim whose "factual predicate ... could not have been discovered previously through the exercise of due diligence" - fairly and accurately describes this Court's pre-AEDPA abuse-of-the-writ jurisprudence. In *McCleskey v. Zant*, this Court variously described the instances in which a habeas petitioner would *not* be found to have abused the writ in a second petition: where he had a "legitimate excuse"; where he "could not comply" with the requirement that he plead claims in a first petition; where "'the factual or legal basis for a claim was not reasonably available to counsel'"; and, similarly, where "the factual basis for the claim" was "unavailab[le]." 499 U.S. at 490, 493, 494, 497. All of those generic descriptions apply equally to claims whose factual predicates were (i) existent but unavailable and (ii) simply non-existent. *See also* Stevenson, *supra*, at 736 (under pre-AEDPA law "any type of claim that was unavailable at the time of the earlier filing - *because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner* - was an appropriate candidate for inclusion in a successive petition" (emphasis added)). By employing generic language - "factual predicate for the claim could not have been discovered through the exercise of due diligence" - Congress in AEDPA clearly adverted to pre-1996 practice and refused to distinguish between the two scenarios. It then (and this is the key) coupled that generic basis for a second petition with a requirement - applicable to *both* categories of claims - that a petitioner establish innocence before proceeding.

Finally, there is no good reason to think that Congress would have wanted to treat the two categories of claims differently. There is no functional difference between them. Whether a claim's factual predicate existed but was unavailable or simply didn't exist at the time the first habeas

was litigated, the point is that the petitioner cannot be faulted for not presenting the claim earlier. The equities are the same in both instances. If a claim's factual predicate existed but was nonetheless unavailable, such that there would have been "cause" under *McCleskey* for failure to present it, it is, as a legal matter, as if the factual predicate did not exist at all. What possible basis could there be for letting a petitioner whose claim did not exist proceed without meeting §2244(b)(2)(B)'s innocence limitation, while requiring a petitioner who technically had a claim *but who had absolutely no reasonable way of knowing about it* to show innocence before proceeding? The two petitioners are identically situated, and what's good for the goose (no one could dispute that §2244(b)(2)(B)'s innocence limitation applies to petitioners whose claims rest on existent-but-unavailable factual predicates) is good for the gander. As it should have, Congress treated them together using generic language that covered both situations – and required them *both* to show innocence before filing a new-facts-based second petition.

Hill's position invites the Court to ignore the balance that Congress struck and to re-write §2244(b)(2)'s plain language. The Court should decline to do so.

III. Hill Has No Absolute Right To Litigate His Eighth Amendment Claim in Federal District Court.

Underlying Hill's entire argument in this Court is the assertion that he is entitled – one way or another – to have his Eighth Amendment claim adjudicated specifically by a *federal* court. If not on federal habeas, then in §1983; if not in §1983, then on federal habeas. *See* Hill Br. 2 ("This case presents the question whether there is any federal forum ...."); *id.* ("The Eleventh Circuit below ... has wholly foreclosed access to the federal courts ...."); *id.* ("Mr. Hill has been denied any federal forum ...."); *id.* at 12 ("[T]he Eleventh Circuit denied Mr. Hill any federal forum ...."); *id.* at 15 ("[U]nder the law of the Eleventh Circuit, no federal court has subject matter jurisdiction to adjudicate his

claim."); *id.* at 16 ("[The] Eleventh Circuit ruling ... denied the petitioner any federal forum ....").

Notably, Hill does not claim here that he has been denied any remedy at all. And with good reason. Before filing the present §1983 suit, Hill filed in state court a successive motion for postconviction relief. Although the trial court rejected Hill's Eighth Amendment claim without holding an evidentiary hearing, the Florida Supreme Court addressed Hill's contentions on the merits and in some detail. Specifically, that court observed that it had held in 2000 that "'the procedures for administering the lethal injection [in Florida] do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.'" *Hill v. State*, No. SC06-2, 2006 WL 91302, at *2 (Fla. Jan. 17, 2006) (quoting *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000)). The court acknowledged that Hill had come forward with new evidence bearing on the constitutional question - namely, (i) an April 2005 article published in the medical journal *The Lancet* and (ii) an affidavit from one of the *Lancet* study's authors. *See id.* at *1. After reviewing the study and affidavit, however, the Florida Supreme Court held that those sources did not "call into question [the earlier] holding in *Sims*." *Id.* at *2. In so holding, the court emphasized, among other things, that the study (i) used data only from other States, not Florida; (ii) is, by its own admission, "inconclusive"; (iii) does not indicate that "providing an inmate with '"no less than two" grams' of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious"; and (iv) does not provide evidence that "an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect." *Id.* This Court denied certiorari review of the Florida Supreme Court's decision. *See Hill v. Florida*, No. 05-8731, 2006 WL 160276 (U.S. Feb. 27, 2006).

Given the merits review that Hill received in the Florida Supreme Court (and the existence, even if unexercised, of certiorari review in this Court), the fact that Hill does not

have at his disposal the full panoply of federal-court remedies - including §1983 - is of no particular moment. There are all manner of procedural rules, defenses, and doctrines that, in certain circumstances, will operate to foreclose a federal court's consideration of a federal constitutional claim under §1983 - even where that claim has never before been decided on the merits. *See, e.g., Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 83-84 (1984) (res judicata); *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (statute of limitations); *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (absolute immunity).

The unstated premise of Hill's argument here - that if habeas corpus is not available to him, §1983 must be - has been squarely rejected by this Court. In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court reviewed a lower-court decision holding, in essence, that because under *Stone v. Powell*, 428 U.S. 465 (1976), a state convict could not raise his Fourth Amendment claim in a federal habeas corpus petition, he was entitled to a "federal judicial hearing of that claim in a §1983 suit." *Allen*, 449 U.S. at 103. This Court expressly rejected that holding, as well as the supposition underlying it "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* That assumption, this Court observed, has no support either "in the Constitution" or "in §1983 itself." *Id.*

The *Allen* Court added, in words uniquely applicable here, that "[t]he only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." *Id.* at 105. This Court then "emphatic[ally] reaffirm[ed] ... the constitutional obligation of the state courts to uphold federal law" and expressed its "confidence in their ability to do so." *Id., accord, e.g., Stone*, 428 U.S. at 493-94 n.35; *Huffman v. Pursue*,

420 U.S. 592, 611 (1975); *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Accordingly, Hill's invocation of the maxim *ubi jus, ubi remedium* and citation to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), just don't wash. Hill has not been denied *a forum* in which to litigate his claim – he has, at most, been denied *a forum of his choice, i.e.*, an "unencumbered opportunity to litigate that [claim] in a federal district court." And under *Allen* and its precursors, that is a constitutional non-event. 449 U.S. at 103.

Hill had his day in court, and he lost. He then had recourse to this Court – a federal court, no less – by way of a petition for certiorari. That is all the law requires.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals' judgment.

Respectfully submitted,

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Appendix: A Side-by-Side Comparison of David Larry Nelson's Complaints

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
48. Of great concern is the fact that many complications of the cut-down procedure are well-recognized by the medical community. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).	112. It is well recognized by the medical community that complications can occur when utilizing the percutaneous central line placement procedure. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia).
49. These complications include the very painful and life-threatening conditions of severe hemorrhage (with accompanying sense of asphyxiation and terror), pneumothorax (with accompanying severe distress, sense of suffocation and potential cardiovascular collapse), and cardiac dysrhythmia (abnormal electrical activity of the heart leading to shock with accompanying severe chest pain, nausea, vomiting, and sense of suffocation or asphyxia). (See Paragraph 18 of Affidavit of Mark Heath, M.D.).	
50. Whenever a cut-down procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator. (See Paragraph 18 of Affidavit of Mark Heath, M.D.).	113. Whenever a percutaneous central line placement procedure is performed in the elective surgical setting, it is imperative that the medical personnel performing the procedure have immediate access to a variety of drugs and medical equipment that includes but is not limited to suction, surgical lighting, surgical instruments, cautery, chest tubes, EKG monitors and equipment, and a defibrillator.
51. The Defendants have not	114. The Defendants have not as-

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
assured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.	sured the Plaintiff that any of the drugs or medical equipment described above will be available during the medical procedure they intend to perform at Holman.
52. Furthermore, the Defendants refuse to supply the Plaintiff with any information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.	115. Furthermore, the Defendants refuse to supply the Plaintiff with any meaningful information concerning the personnel who will be present during the medical procedure to be performed on the Plaintiff prior to the legal procedure of his execution by lethal injection.
53. As Dr. Mark Heath explains, many, if not most, physicians have never personally performed a cut-down procedure and do not possess the requisite skills for competently and safely performing such a procedure. (See Paragraph 14 of Affidavit of Mark Heath, M.D.).	116. Most physicians do not possess the requisite skills to competently and safely perform a percutaneous central line placement procedure.
54. Hospitals in the private sector require medical practitioners to be credentialed for the specific procedure of cut-downs for the purpose of safeguarding patients by ensuring that procedures are performed by experienced and competent personnel. (See Paragraph 15 of Affidavit of Mark Heath, M.D.).	
55. Subjecting a person to a cut-down procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome. (See Paragraph 16 of Affi-	117. Subjecting a person to a percutaneous central line placement procedure in the hands of inexperienced personnel would represent a clear risk of a medical misadventure and botched outcome.

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
davit of Mark Heath, M.D.).	
56. Any person undergoing a cut-down procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).	118. Any person undergoing a percutaneous central line placement procedure should be entitled to review the credentials, certification, and training record of the medical personnel who will be performing the procedure.
57. In the absence of such a review, *and particularly given Defendant Culliver's refusal to permit such scrutiny*, there is a complete lack of any reasonable assurance that the medical procedure Defendant Culliver intends to perform on the Plaintiff as a predicate to his execution will be humane. (See Paragraph 17 of Affidavit of Mark Heath, M.D.).	119. In the absence of such a review, and particularly given the Defendants' refusal to disclose any meaningful information, there is a complete lack of any reasonable assurance that the medical procedure the Defendants intend to perform on the Plaintiff as a predicate to his execution will be humane.
58. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citation omitted).	120. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff carries with it a substantial risk of inflicting substantial and prolonged pain. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (punishments are cruel when they entail exposure to risks that "serve[] no 'legitimate penological objective'"; prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement if he knows that inmates face substantial risk of serious harm) (citations omitted).

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
59. The cut-down procedure Defendant Culliver apparently intends to perform on the Plaintiff does not comport with evolving standards of decency. *See Gregg v. Georgia*, 428 U.S. 153, 171 (1976) and *Trop v. Dulles*, 356, U.S. 86, 101 (1958).	121. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff does not comport with evolving standards of decency. *See Gregg v. Georgia*, 428 U.S. 153, 171 (1976) and *Trop v. Dulles*, 356, U.S. 86, 101 (1958).
60. The cut-down procedure the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. *See Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).	122. Given the Defendants' refusal to disclose any meaningful information and refusal to confirm adequate safeguards will be in place, the percutaneous central line placement procedure that the Defendants apparently intend to perform on the Plaintiff impermissibly entails unnecessary mental as well as physical pain and suffering during the execution process. *See Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).
	123. The Defendants through their actions are treating the Plaintiff with "deliberate indifference". *See Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994).
	124. The Defendants' "deliberate indifference" to the Plaintiff's serious medica needs violates the Eighth Amendment's prohibitions against cruel and unusual punishments and creates a risk of "unnecessary and wanton infliction of pain". *See Estelle v. Gam-*

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
	ble, 429 U.S. 97 (1976).
61. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing alternative methods or altering the procedures employed in the execution process, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.	125. If the risks of inflicting pain and suffering associated with execution by lethal injection in the Plaintiff's case may be easily remedied or mitigated by employing adequate safeguards, the Defendants' failure to take these steps violates the Plaintiff's rights under the United States Constitution.
62. According to Dr. Mark Heath, there is an alternative procedure that the Defendants could utilize in gaining venous access in the Plaintiff that would easily remedy or mitigate the risks of unnecessary pain and suffering inherent in the cut-down procedure Defendant Culliver intends to utilize. (See Paragraphs 20, 21, 22, and 23 of Affidavit of Mark Heath, M.D.).	
63. This alternative procedure is referred to by several terms, including percutaneous central line placement, percutaneous central access, percutaneous central venous cannulation, and percutaneous technique. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).	
64. This procedure has, except in rare circumstances, supplanted the use of the cut-down procedure and is superior to the cut-down procedure in virtually all regards. (See Paragraph 23 of	

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
Affidavit of Mark Heath, M.D.).	
65. This procedure is less invasive, less painful, faster, cheaper, and safer that [sic] the cut-down procedure. (See Paragraph 23 of Affidavit of Mark Heath, M.D.).	
66. Because of this procedure's more widespread use, more physicians are proficient and competent in performing this procedure as compared to the cut-down procedure.	
67. It would be extraordinarily rare to perform a central venous cut-down procedure without first attempting and failing to successfully obtain venous access using this procedure.	
68. The Defendants have not articulated a reason for implementing the barbaric cut-down medical procedure on the Plaintiff in lieu of the medical procedure available that meets contemporary standards of medical care.	126. The Defendants have not articulated a reason for refusing to provide the Plaintiff with the information requested in Paragraph 109, *supra*.
69. Of significance and as referenced above, Defendant Culliver will not disclose the training or qualifications of the person(s) responsible for performing either the medical procedure on the Plaintiff that Defendant Culliver has acknowledged must be performed as a predicate to the legal procedure of execution or the legal procedure of execution by lethal injection.	127. Significantly, as referenced above, the Defendants refuse to disclose the training or qualifications of the individuals responsible for performing the percutaneous central line placement procedure on the Plaintiff as a predicate to the Plaintiff's execution by lethal injection.

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
70. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will even be present during the requisite medical procedure and/or the legal procedure of execution by lethal injection.	128. As such, it is unknown to anyone other than the Defendants whether a physician with the appropriate credentials, training, and experience will even be present during the percutaneous central line placement procedure.
71. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the medical procedure performed on the Plaintiff and during the execution itself raises issues of constitutional importance.	129. The refusal of the Defendants to identify and describe the medical personnel, if any, that will be present during the percutaneous central line placement procedure performed on the Plaintiff raises issues of constitutional importance.
72. The Defendants are deliberately preventing the public, the courts, and the condemned prisoners themselves from knowing any meaningful information about the lethal injection protocol and any accompanying medical procedure protocol that the Defendants intend to use in the killing of citizens of the State of Alabama.	
73. Independent public scrutiny undeniably plays a significant and indispensable role in the proper functioning of capital punishment.	
74. Public disclosure of Alabama's lethal injection protocol and accompanying mandated medical procedures for gaining venous access are critical in allowing the public to determine whether the punishment of exe-	

ORIGINAL COMPLAINT: CUT-DOWN

cution by lethal injection in the State of Alabama comports with "the evolving standards of decency which mark the progress of a maturing society". *Trop v. Dulles*, 356 U.S. 86 (1958).

75. For this Court and for the public to determine whether lethal injection execution in the State of Alabama in being humanely administered in cases where peripheral intravenous access is not possible, the State of Alabama must disclose reliable information about its lethal injection protocol and the mandated medical procedures that will be employed to gain venous access in condemned prisoners.

76. As it stands now, this Court, the public, and the Plaintiff are being forced to rely upon the very people responsible for designing and administering the protocol and performing the invasive and risky medical procedures for assurances that the protocol and procedures are sound and that they comport with "the evolving standards of decency".

77. in order to pass constitutional muster, an independent body - such as this Court or the public - must be allowed to review the State of Alabama's protocol.

78. It should be stressed that there exists a humane method fro gaining venous access in the Plaintiff that does not violate the Plaintiff's Eighth Amendment

AMENDED COMPLAINT: CENTRAL LINE PLACEMENT

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
rights, but Defendant Culliver is adamant that he intends to implement an inhumane method for gaining venous access in the Plaintiff that does violate the Plaintiff's Eighth Amendment rights.	
79. Given the fact that Defendant Culliver has conceded that the Plaintiff's execution will mark the first instance of the State of Alabama having to first perform an invasive medical procedure on a condemned inmate to gain venous access, there exists a substantial risk that the Defendants intend to violate the Eighth Amendment's prohibitions against inflicting cruel and unusual punishments with respect to the Plaintiff.	
80. Given the posture that the Defendants have taken regarding the secrecy of the lethal injection protocol and accompanying mandated medical procedures, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in administering the punishment of lethal injection execution to the Plaintiff.	130. Given the posture that the Defendants have taken regarding the secrecy concerning the utilization of the percutaneous central line placement procedure, this Court cannot be confident that the Defendants are taking all necessary and appropriate steps to minimize the known significant risks of inflicting severe and unnecessary pain and suffering in gaining venous access as a predicate to the Plaintiff's execution.
81. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the humaneness of the execution procedure, it is respectfully submitted that this Court	131. Where, as here, the Plaintiff has demonstrated the existence of genuine and realistic concerns about the medical dangers associated with the execution procedure, it is respectfully submitted

ORIGINAL COMPLAINT: CUT-DOWN	AMENDED COMPLAINT: CENTRAL LINE PLACEMENT
cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).	that this Court cannot, in good conscience, condone the risk of sending the Plaintiff to his state sponsored death without first assuring itself that the constitutional prohibitions against the infliction of "unnecessary pain in the execution of the death sentence" will be honored. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

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IN THE

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner.

vs

JAMES R. MCDONOUGH, Interim Secretary, Florida Department of Corrections, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is habeas corpus the exclusive federal remedy for a death-sentenced inmate to challenge the state's standard protocol for execution, or can 42 U. S. C. § 1983 be used to bypass the limitations Congress has placed on habeas corpus?

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CLARENCE E. HILL,

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Florida Department of Corrections, et al.,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In 1996, Congress enacted a landmark reform of the law of habeas corpus, the Antiterrorism and Effective Death Penalty Act of 1996, to curb the rampant abuses that had occurred up

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

to that time, particularly in capital cases. Petitioner in this case seeks to evade the limitations imposed by Congress by captioning his pleading as a civil rights complaint instead of a habeas petition. Such evasion is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Clarence Hill murdered Pensacola Police Officer Steve Taylor *twenty-three years ago.*

> "On October 19, 1982, appellant stole a pistol and an automobile in Mobile, Alabama. Later that day, appellant and his accomplice, Cliff Jackson, drove to Pensacola and robbed a savings and loan association at gunpoint. When the police arrived during the robbery, appellant fled out the back of the savings and loan building. Jackson exited through the front door, where he was apprehended immediately. Appellant approached two police officers from behind as they attempted to handcuff Jackson. Testimony established that appellant drew his pistol and shot the officers, killing one and wounding the other." *Hill* v. *State*, 477 So. 2d 553, 554 (Fla. 1985) ("*Hill I*").

To say that Hill's case has been extensively reviewed would be an understatement. On the first appeal, the Florida Supreme Court affirmed the conviction but reversed the sentence based on denial of a challenge for cause, although the views of the juror in question fell well short of the automatic vote rule later announced in *Morgan* v. *Illinois*, 504 U. S. 719, 729 (1992). Cf. *Hill I*, *supra*, at 555. After a second penalty trial, the Florida Supreme Court affirmed the death sentence. *Hill* v. *State*, 515 So. 2d 176 (Fla. 1987) ("*Hill II*"), cert. denied, *Hill* v. *Florida*, 485 U. S. 993 (1988). State postconviction relief was denied on the merits. See *Hill* v. *Dugger*, 556 So. 2d 1385 (Fla. 1990).

After a Federal District Court found fault with the harmless error analysis in *Hill II*, the Florida Supreme Court reopened the appeal, reweighed the aggravating and mitigating factors, and reaffirmed the death sentence. *Hill* v. *State*, 643 So. 2d 1071, 1072-1074 (Fla. 1994) ("*Hill IV*"), cert. denied, *Hill* v. *Florida*, 516 U. S. 872 (1995). The Eleventh Circuit had stayed its proceedings pending *Hill IV*, see *Hill* v. *Moore*, 175 F. 3d 915, 920 (CA11 1999), and nearly five years after that decision it affirmed denial of habeas relief. See *id.*, at 930. This Court denied certiorari on January 10, 2000. See *Hill* v. *Moore*, 528 U. S. 1087 (2000).

Four days later, Governor Jeb Bush signed the bill changing Florida's primary method of execution to lethal injection. See *Sims* v. *State*, 754 So. 2d 657, 663, and n. 11 (Fla. 2000). The Florida Supreme Court considered on the merits a third postconviction petition by another inmate nearing execution and rejected claims very similar to those being made in the present case. See *id.*, at 659, 665-668, and nn. 17-20. The questions about dosage and claims of executions being "botched" in other states using lethal injection were known and being litigated at the time of enactment of the statute.

Hill pursued postconviction relief on an unrelated issue, see Pet. for Cert. 5-6, and denial of relief was affirmed by the Florida Supreme Court on May 13, 2005. See *Hill* v. *State*, 904 So. 2d 430 (Fla. 2005).

In the April 16-22, 2005 issue of The Lancet, a British medical journal, an article claimed that the level of anesthesia in American lethal injection procedures may be insufficient to prevent suffering. See Koniaris, Zimmers, Lubarsky, & Sheldon, Inadequate Anaesthesia in Lethal Injection for Execution, 365 The Lancet 1412 (2005).[2] In the correspon-

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2. Although The Lancet is a reputable journal, an accompanying editorial casts doubt on whether the editors maintain objectivity on this issue. For example, the editorial states, "Few experts believe that the threat of capital punishment is an effective deterrent." Editorial, Medical

dence section of a subsequent issue, the article was challenged in letters by multiple experts, and the original authors gave their reply. See Groner, et al., Inadequate Anaesthesia in Lethal Injection for Execution/Authors' Reply, 366 The Lancet 1073 (2005).

Governor Bush signed a new death warrant on November 29, 2005. See *Hill* v. *State*, 2006 Fla. Lexis 8, *2 (Jan. 17, 2006) ("*Hill VII*"). On December 15, after the warrant was signed, eight months after the article was published, and nearly six years after similar issues had been aired in *Sims*, Hill filed a new postconviction motion. Under Florida Rule of Criminal Procedure 3.851(h)(5), all such motions filed after issuance of the death warrant are subject to the requirements for successive motions. See *Hill VII*, at *4; see also *Bell* v. *Thompson*, 545 U. S. ___, 125 S. Ct. 2825, 2832-2833, 162 L. Ed. 2d 693, 704 (2005) (recognizing particular disruptiveness of new proceedings after scheduling of execution date). The circuit court denied the motion, and the Florida Supreme Court affirmed on January 17, 2006. Although the Florida Supreme Court's decision on the injection claim discusses the merits, see *Hill*

Collusion in the Death Penalty: An American Atrocity, 365 The Lancet 1361 (2005). Even the most elementary literature search, a strict prerequisite for a scientific article, would have disclosed the large and growing body of econometric evidence of deterrence. See, *e.g.*, Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003); Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453 (2003); Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Studies 283 (2004); see also Articles on Death Penalty Deterrence, http://www.cjlf.org/deathpenalty/DPDeterrence.htm (revised Mar. 27, 2006) (collecting abstracts of these and other studies). Although the deterrence debate is not concluded, the fact that the editors of The Lancet would blithely recite a trite and false claim of expert consensus, when there is in fact a robust debate in the published literature, indicates a bias and a disregard for normal standards of scientific publications which undercut the probative value of their acceptance of the Koniaris article.

VII, at *4-*8, the State characterizes it as a ruling that the claim was procedurally defaulted. See Brief in Opposition 9, n. 7.[3]

On January 20, Hill applied to the Eleventh Circuit for leave to file a successive habeas petition, claiming that he was mentally retarded. See *In re Hill*, 437 F. 3d 1080 (CA11 2006) ("*Hill VIII*"). The Court of Appeals denied it as untimely on January 24.

Also on January 20, Hill filed the present civil rights action in Federal District Court under 42 U. S. C. § 1983, seeking declaratory and injunctive relief that lethal injection violates the Eighth Amendment. See *Hill* v. *Crosby*, 437 F. 3d 1084, 2006 U.S. App. Lexis 1674, *1 (CA11 2006) ("*Hill IX*"). The District Court dismissed it the following day on the ground that it was the "functional equivalent of a successive habeas petition." *Id.*, at *2 (internal quotation marks omitted). The Court of Appeals affirmed, see *id.*, at *2-*3, based on its earlier decision in *Robinson* v. *Crosby*, 358 F. 3d 1281 (CA11 2004). Hill petitioned for a stay and writ of certiorari. Justice Kennedy granted the stay the same day, and the Court granted the writ of certiorari the next day. Hill's stay application and petition for certiorari to the Supreme Court of Florida were denied January 24 and February 27, respectively.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1871, now codified at 42 U. S. C. § 1983, may not be used to circumvent the limitations placed on habeas corpus by the Congress and by this Court's precedents. *Preiser* v. *Rodriguez* settled that when the relief sought is within the scope of habeas corpus, that procedure is exclusive. If the limitations placed on habeas preclude relief, § 1983 cannot be used to obtain what Congress has decided to deny.

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3. If the decision had been on the merits, it would have preclusive effect in a § 1983 suit. See *Allen* v. *McCurry*, 449 U. S. 90, 103-104 (1980).

Shorthand references in noncapital cases to the scope of habeas as "the fact and duration of confinement" are not controlling. The underlying principle is that the habeas remedy is exclusive for claims within its scope. Habeas is well established as the proper procedure for penalty phase and method of execution claims going back over a century, even though neither type of claim seeks to shorten the duration of confinement. Habeas is available for method-of-execution claims when they are timely raised, even when the state changes its method. It is not available in this case because of petitioner's choice to delay until the eleventh hour, and Congress's prohibition of such late claims must not be circumvented.

ARGUMENT

I. The rule of *Mitchum v. Foster* should not be extended beyond its purpose.

A. Mitchum v. Foster.

On its face, the Anti-Injunction Act, 28 U. S. C. § 2283, would seem to preclude the injunction that petitioner seeks in this case. "A court of the United States may not grant an injunction to stay proceedings in a State court except as *expressly* authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Emphasis added.) Justice Brandeis, writing for a unanimous Court, described the predecessor statute in *Hill* v. *Martin*, 296 U. S. 393, 403 (1935) (emphasis added; footnotes omitted):

> "The prohibition of § 265 is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by

its ministerial officers; *applies not only to execution issued on a judgment*, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

Petitioner brought the present action under 42 U. S. C. § 1983. That statute authorizes a "suit in equity" for violations of federal rights. It says nothing about staying state court actions. Indeed, at the time of *Mitchum* v. *Foster*, 407 U. S. 225 (1972), it did not mention actions in other courts at all. Yet *Mitchum* held, "The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.*, at 238. Applying that standard to the intent of the Reconstruction Congress, *Mitchum* held that § 1983 "falls within the 'expressly authorized' exception" to the Anti-Injunction Act. *Id.*, at 243.

A leading federal courts casebook asks rhetorically, "Didn't Mitchum read 'expressly authorized' to mean 'impliedly authorized'? Is that a tenable position?" R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's Federal Courts and the Federal System 1162 (5th ed. 2003). Yes, it did, and no, it isn't. *Mitchum* is judicial disregard of unambiguous statutory language of the most blatant kind. For justification, the opinion relied on caselaw that predated the 1948 enactment of the present statute, see 407 U. S., at 234-235, combined with a Revisor's Note that the statute was intended "to restore 'the basic law as generally understood and interpreted prior to the Toucey[4] decision.' " *Id.*, at 236.

It is far from "evident" from this Note that the statute extends beyond "the specific holding of *Toucey*," cf. *ibid.*, to encompass the entire pre-1948 jurisprudence. The Note hedges with the word "generally," and the *Mitchum* opinion can muster only one example of a pre-1948 case where a federal statute

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4. *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118 (1941).

that does not specifically refer to other court proceedings was held to create an exception. See *id.*, at 234-235, and nn. 12-17. The one case, referred to in note 17, was an emergency regulation in wartime, decided after *Toucey*, not before. Yet even if the Note did have the sweeping meaning the *Mitchum* Court read into it, it would contradict the fundamental principle that legislative history cannot override unambiguous statutory language. "No matter how clearly its report purports to do so, a committee of Congress cannot take language that could only cover 'flies' or 'mosquitos,' and tell the courts that it really covers 'ducks.' " *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 611, n. 4 (1991). By the same token, a Revisor's Note cannot strike the word "expressly" from the statute, yet that is exactly what *Mitchum* allowed it to do.

Although wrongly decided, *Mitchum* is now a precedent of long standing. It is also a statutory interpretation precedent, which gives it extra weight in the *stare decisis* calculus. See, *e.g.*, *Neal* v. *United States*, 516 U. S. 284, 295 (1996). *Amicus* CJLF therefore does not suggest that it should be overruled. It is entirely plausible that subsequent Congresses have decided to leave *Mitchum* in place because the damage that it might have caused has been effectively contained by the rules of *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973) and *Younger* v. *Harris*, 401 U. S. 37 (1971).[5] *Preiser* is discussed in Part II, *infra*, and *Younger* is discussed in Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Nelson* v. *Campbell*, No. 03-6821, pp. 10-15. When applying the *Preiser* and *Younger* rules, however, it is helpful to keep in mind just how shaky is the foundation of authority for federal courts to enjoin the execution of state judgments at all.

The holding of *Mitchum* rests entirely on the Court's conclusion that Congress wanted the federal courts to be able

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5. A post-*Mitchum* amendment to § 1983, Pub. L. 104-317, § 309(c), 110 Stat. 3853, limits injunctions against judicial officers but implicitly authorizes them in unusual circumstances.

to enjoin state court proceedings under the Civil Rights Act in certain extreme circumstances. See 407 U. S., at 242. Where the reason for *Mitchum*'s rule ends, its rule should end. See *Lockhart* v. *Fretwell*, 506 U. S. 364, 373 (1993). Injunctions against state court proceedings under § 1983 should not be issued in circumstances where issuance is contrary to the intent of a later-enacted statute, and a last-minute method-of-execution claim in a state capital case is precisely such a circumstance.

B. The Harris Case.

In the debate over the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the proponents repeatedly cited one case as the premier example of what was wrong with the system. That was the case of Robert Alton Harris, whose execution culminated in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992) and *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (*per curiam*). See, *e.g.*, 141 Cong. Rec. 4111-4112 (1995) (statement of Mr. Cox); *id.*, at 14734 (statement of Sen. Feinstein); *id.*, at 15019 (statement of Sen. Specter). In that case, a challenge to the standard method of execution which had been in use for decades was deliberately withheld through multiple rounds of litigation, including an appeal, nine state habeas petitions, and four federal habeas petitions, only to be filed in a civil rights suit a few days before the scheduled execution. See *Gomez*, *supra*, at 653 (four prior federal habeas); Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 322 (1992) (chronology, noting ninth state habeas petition, execution date set for April 21, 1992, civil rights suit filed April 17). "There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez*, *supra*, at 654.

In *Gomez*, this Court did not allow the use of § 1983 to circumvent the successive petition rule of *McCleskey* v. *Zant*, 499 U. S. 467 (1991). Congress responded by enacting a new

successive petition rule, more stringent than *McCleskey*. See 28 U. S. C. § 2244(b); *Felker* v. *Turpin*, 518 U. S. 651, 656-657 (1996). No language was included to specifically prohibit use of § 1983 to evade the new rule. None appeared to be needed. The precedents of *Gomez* and *Preiser* should have been sufficient.

In passing AEDPA, Congress confirmed this Court's disapproval of the tactics used in the Harris case. Congress raised the hurdle for successive petitions and their accompanying stays several notches higher than this Court's case law. Given that the *Mitchum* rule is based on an inference of congressional intent, the intent of the 104th Congress should also be considered in its application. That Congress intended to sharply limit federal court interference with state capital judgments after the first federal petition. The *Preiser* rule, properly applied, will implement that intent.

II. The Civil Rights Act may not be used to circumvent Congress's limits on habeas corpus.

A. The Specific and the General.

This case brings the Court once again to the well-traveled intersection between the Civil Rights Act of 1871, 42 U. S. C. § 1983, and the federal habeas corpus statute for state prisoners, 28 U. S. C. § 2254. See *Heck* v. *Humphrey*, 512 U. S. 477, 480 (1994); *Preiser* v. *Rodriguez*, 411 U. S. 475, 482-484 (1973). The rule of the road is well established that habeas corpus, as the more specific of the two, has the right-of-way at this crossing, *i.e.*, it "must be understood to be the exclusive remedy available in a situation like this where it so clearly applies." *Preiser*, *supra*, at 489. Little more than reaffirmation of this principle is needed to answer the question presented in this case.

Federal court litigation by state-court criminal defendants has long raised delicate questions of federalism. See, *e.g.*, *Ex*

parte Royall, 117 U. S. 241, 252-253 (1886) (habeas); *Fenner* v. *Boykin*, 271 U. S. 240, 244 (1926) (civil rights); *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951) ("special delicacy"). Both the habeas statute and the Civil Rights Act require striking a balance between the need to protect federal rights from state action and the need to avoid undue interference in the state's administration of its own laws. For the Civil Rights Act, these needs are accommodated through several doctrines of "abstention," the most important of which is the *Younger* doctrine. See *supra*, at 8. However, the problem has received more attention both from this Court and from Congress in the area of habeas corpus, because federalism is implicated in every § 2254 case, not just occasionally as it is in § 1983 litigation. This greater attention has resulted in a more developed body of law, with a finely crafted set of rules defining the limits of federal court action. Particularly where Congress has balanced the interests and defined the limits, courts and litigants must not be permitted to evade those limits and upset that balance simply by attaching a different label. See, *e.g.*, *Calderon* v. *Thompson*, 523 U. S. 538, 553-554 (1998) (limits on successive petitions guide discretion in motion to recall mandate, to preclude evasion).

The plaintiffs in *Preiser* had lost good time credits in prison discipline proceedings and sought to challenge those proceedings in Federal District Court in § 1983 actions, combined with habeas corpus petitions. See 411 U. S., at 476-482. The relief they sought was release from confinement. See *id.*, at 487. Court of Appeals panels in two of the three cases held that the cases were habeas petitions, not civil rights actions, and as such had to be dismissed for nonexhaustion. See *id.*, at 479-481. These decisions were reversed en banc. See *id.*, at 482. This Court reversed in turn.

Preiser discusses the scope of habeas corpus and the relief available under it as that procedure had evolved through the time of the decision, not just the very limited review of jurisdiction of the committing court available in the early

1800s. See *id.*, at 484-486. "In the case before us, the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus." *Id.*, at 487. If they succeeded, they would be released from custody earlier, the relief typically available in habeas. Again, the word "traditional" in this passage includes modern expansions of the scope of habeas. See *id.*, at 487-488. The *Preiser* Court rejected the position of the dissent that the Civil Rights Act should reach wherever habeas relief would not have been available in times past. See *id.*, at 488, n. 8.

The broad language of the Civil Rights Act, applicable to the case on its face, was not conclusive. *Preiser* held that the Civil Rights Act could not be used where the subject matter of the suit was so clearly within the scope of "the *specific* federal habeas corpus statute." *Id.*, at 489 (emphasis added). This conclusion was based squarely on the need to prevent evasion of congressional limits on habeas, of which exhaustion was the most important at that time. "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings." *Id.*, at 489-490. Although *Preiser* speaks in terms of the exhaustion requirement and attacks on the fact and length of confinement, its underlying principle is somewhat broader. If the relief sought is the type of relief for which Congress has provided habeas corpus, then the Civil Rights Act must not be used to evade the limitations that Congress has placed on habeas and upset the balance that Congress has struck. It is no answer to say that this particular plaintiff cannot actually obtain relief on habeas. Two of the *Preiser* plaintiffs could not, because they had failed to exhaust state remedies. See *id.*, at 479-481. If Congress has decided that habeas relief should not extend to a prisoner in the petitioner's circumstances, that is precisely the policy determination that the courts must respect and not evade through the Civil Rights Act. See *id.*, at 490-491.

The rule of *Preiser* that the specific statute, with its limitations, controls in the area where the specific and general statutes overlap, see *Spencer* v. *Kemna*, 523 U. S. 1, 20 (1998) (Souter, J., concurring), is simply one application of a well-established principle. *Brown* v. *GSA*, 425 U. S. 820 (1976) illustrates the breadth of this principle. Congress had provided a remedy for discrimination claims by federal employees in 42 U. S. C. § 2000e-16. The plaintiff missed the deadline for judicial review of the administrative determination of his claim, and he tried to evade that requirement by invoking the general employment discrimination statute. See *Brown*, *supra*, at 823-824. Quoting *Preiser*, *Brown* held that the balance struck by Congress could not be evaded merely by attaching a different label. *Id.*, at 832-833. "It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.*, at 833. "In a variety of contexts the Court has held that a precisely drawn, detailed statute preempts more general remedies." *Id.*, at 834 (citing *Preiser*, along with cases on Federal Tort Claims Act, Suits in Admiralty Act, and venue requirements in patent cases). A specific remedy may be cumulative rather than exclusive when the language or history of the statute indicates that intent, see *id.*, at 833-834, but neither the habeas statute in *Preiser* nor the employment statute in *Brown* fell in that category. See *id.*, at 835. In each case, the specific remedy was exclusive, and the plaintiff could not invoke the general one, even though the specific one was no longer available to him.

In the cases since *Preiser*, the line between § 1983 and habeas has not always been easy to draw, but two consistent themes emerge. Section 1983 may not be used to obtain release from custody directly, nor may it be used to prevent the state from carrying out the judgment as entered.

In *Wolff* v. *McDonnell*, 418 U. S. 539, 554-555 (1974), § 1983 was not available to restore good time credits, but it was available for injunctive relief and damages for improper

procedures for revocation of good time. An injunction requiring certain procedures in a good time revocation hearing does not prevent the state from carrying out its judgment. The prison merely needs to hold a new hearing, and the prisoner meanwhile remains in prison. Similarly, *Gerstein* v. *Pugh*, 420 U. S. 103, 107, n. 6 (1975), permitted injunctive relief regarding pretrial detention hearings. Release was not asked, and there was not yet any state court judgment to interfere with.

Heck v. *Humphrey*, 512 U. S. 477, 478-479 (1994) involved a suit for damages by a prisoner who claimed his conviction was invalid but whose challenges to that conviction on appeal and in habeas corpus had been rejected. The majority avoided the collision between § 1983 and habeas by reading into § 1983 a requirement that if a claim necessarily implies invalidity of the conviction or sentence, the state judgment must be actually set aside in other proceedings before a § 1983 suit can proceed. See *id.*, at 486-487. This rule precludes the possibility that a prisoner could evade the habeas exhaustion requirement (and, since AEDPA, the deference standard) by getting a § 1983 judgment that resolves the validity of the criminal judgment and then attacking the criminal judgment in state court with a claim that federal judgment must be given preclusive effect.

Justice Souter concurred in the judgment, joined by three other Justices. He noted that an action for damages for unlawful confinement "would, practically, compel the State to release the prisoner." *Id.*, at 498. *Preiser* therefore applied, and requires "a state prisoner challenging the lawfulness of his confinement to follow habeas's rules before seeking § 1983 damages . . . ." *Ibid.* Under either approach, § 1983 cannot be used to prevent a state from carrying out its criminal judgment. Certiorari from this Court and habeas in the lower federal courts are the exclusive means Congress has provided for that purpose.

Three recent cases have applied the *Preiser/Heck* rule to prison discipline proceedings. In *Edwards* v. *Balisok*, 520 U. S. 641 (1997), the prisoner sought declaratory relief and

damages for alleged due process violations in the revocation of good-time credit, where the violations alleged would necessarily have rendered the revocation invalid. See *id.*, at 643, 648. The claim was therefore not cognizable under § 1983 despite the facts that the prisoner did not seek release and that the claim went to procedure rather than substance of the revocation. See *id.*, at 645. Injunctive relief might be available, however, to enjoin future due process violations. See *id.*, at 648-649. The Court also noted that the § 1983 suit must be dismissed, not stayed, to the extent it was precluded. See *id.*, at 649.

In contrast, *Muhammad* v. *Close*, 540 U. S. 749, 752-753 (2004) (*per curiam*) was a suit for damages for retaliatory prosecution of a charge on which the prisoner was acquitted. He did not challenge his discipline on another charge, on which he was convicted. See *id.*, at 753. Because the claim could not have any effect on the time served, there was no basis for habeas relief, and the *Heck* rule was inapplicable. See *id.*, at 754-755.

Wilkinson v. *Dotson*, 544 U. S. 74, 125 S. Ct. 1242, 1248, 161 L. Ed. 2d 253, 262 (2005) reviewed the cases and summarized the rule "that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought . . . , no matter the target of the prisoner's suit . . . —*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." Because the prisoners sought only new parole hearings, at which the authorities could deny parole, validity of confinement or its duration was not at issue, and § 1983 relief was not precluded. See *id.*, 125 S. Ct., at 1248, 161 L. Ed. 2d, at 263.

All of these cases are decided in the context of convictions for noncapital felonies punished by incarceration. Fact and duration of confinement, in this context, is equivalent to the ability of the state to enforce its criminal judgment. In each case where the state can continue to keep the prisoner in prison for the full duration that it would have imprisoned him without

federal court action, the § 1983 case can proceed. Where the outcome would result in a shorter duration of confinement, thereby altering the outcome of the state's criminal processes, habeas corpus is the exclusive federal remedy.

Translated into the realm of capital punishment, the equivalent of "release from confinement or a *shorter* stay in prison," see *ibid.* (emphasis added), is removal of the death sentence or *delay* in its execution. Just as a noncapital felon is barred from § 1983 if his claim would result in one day *less* in prison, so the capital murderer is barred if success would mean one day *more* delay in the state's execution of its judgment. We will return to this point in discussing the *Nelson* case *infra*, at 19-20, but first some background on habeas corpus and method-of-execution claims is necessary.

B. Habeas and Method of Execution.

Under *Preiser*, the threshold question in determining whether a § 1983 action is cognizable is simply one of whether the claim lies within the scope of habeas corpus. Although the use of habeas to litigate method of execution claims "may lack a perfect historical pedigree," cf. *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) (cause and prejudice test for procedural default), it is well established at this point. In the usual habeas case, the prisoner is contending that he should not have been convicted at all, and hence should not have been imprisoned at all, or else that his sentence of incarceration is too long and he should be released sooner. Hence, the dispute is typically stated as a challenge to the fact or duration of confinement. See, *e.g.*, *Porter* v. *Nussle*, 534 U. S. 516, 527 (2002); see also *Muhammad*, 540 U. S., at 750 ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . "). In challenges to the penalty phase of a capital case, the prisoner is contending that he *should* have been sentenced to life in prison, and so in a sense it is the prisoner who is arguing for a *longer* confinement than the state wishes to impose. Even so, penalty phase claims have

been routinely reviewed on habeas throughout the modern capital punishment era. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 698-699 (1984). Congress enacted its most recent reforms of habeas corpus with capital cases as its central focus, see 141 Cong. Rec. 15018 (1995) (statement of Sen. Specter), and it did not eliminate the penalty phase litigation, so it must have intended that this practice continue.

Review of method of execution on habeas goes back at least to *In re Kemmler*, 136 U. S. 436 (1890), an Eighth Amendment challenge to electrocution. The Court denied an application for writ of error because the decision below was "so plainly right," *id.*, at 447, *i.e.*, on the merits, without any hint that habeas was an incorrect procedure. *Kemmler* arose on state habeas, so the Court would not necessarily have commented on the procedure if the state courts did not, but the same year the Court denied federal habeas on the same ground in *Jugiro* v. *Brush*, 140 U. S. 686 (1890). The Court summarily affirmed by citing *Kemmler*, a merits decision. In the modern era, *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 653 (1992) (*per curiam*) clearly contemplates that habeas is available for a method of execution claim, and at least hinting if not holding that habeas is the exclusive remedy. In *Stewart* v. *LaGrand*, 526 U. S. 115 (1999) (*per curiam*), a method of execution claim was decided on habeas on the basis of well-established habeas doctrine, with no question of the applicability of the procedure. See *id.*, at 119 (citing *Teague* v. *Lane*, 489 U. S. 288 (1989) and *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991)). Of course, the unexplained and unchallenged exercise of jurisdiction does not form a precedent which is binding in a case where the question is squarely presented, see *Lewis* v. *Casey*, 518 U. S. 343, 352, n. 2 (1996), but the long history of the exercise of this jurisdiction does at least illustrate that method of execution claims are established and accepted as being within the scope of habeas corpus.

The fact that Florida changed its method of execution to lethal injection after Hill's first federal petition was completed raises a question of whether habeas is a practical remedy for litigating a changed method. The Court's interpretation of both the successive petition and statute of limitations provisions of AEDPA indicate that it is.

The habeas statute of limitations begins on the latest of several events, one of which is "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U. S. C. § 2244(d)(1)(D). *Johnson* v. *United States*, 544 U. S. 295, 125 S. Ct. 1571, 1579, 161 L. Ed. 2d 542, 553-554 (2005) gave a practical construction to the parallel language of § 2255 to include a "necessary condition for relief," in that case the vacatur of a prior conviction. A prisoner in Hill's situation could hardly ask for relief from a method of execution before its adoption, so by analogy to *Johnson* the one-year clock began running when Florida changed its method.

The successive petition limitation has also been interpreted flexibly enough to accommodate this situation. If a first petition is dismissed as unexhausted, a new petition following exhaustion is not subject to the "second or successive petition" rule of 28 U. S. C. § 2244(b), even though it literally fits that description. See *Slack* v. *McDaniel*, 529 U. S. 473, 488 (2000). Similarly, a claim of mental incompetence to be executed previously dismissed as unripe could be reasserted when it became ripe. See *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644-645 (1998).

Hill could have filed a federal habeas petition challenging Florida's method of execution within one year of its adoption, plus tolling for any time a properly filed state petition was pending. Instead, he waited five years, after the federal statute had run, and after the death warrant had been signed, raising a procedural bar under clearly established state law. See *supra*, at 4-5. Habeas corpus is available for method-of-execution claims when it is diligently sought, but it is not available when

the claims are held in reserve to spring on the courts at the last minute to stop a scheduled execution.

C. Nelson v. Campbell.

Although all previous method-of-execution cases in this Court had been resolved on habeas or by applying habeas principles, the Court allowed a § 1983 suit in *Nelson* v. *Campbell*, 541 U. S. 637 (2004). The Court was careful to characterize its holding as "extremely limited," *id.*, at 649, and not resolving the issue regarding "method-of-execution claims generally." *Id.*, at 644.

Nelson involved a controversy over the use of a "cut-down" procedure for execution of an inmate whose veins were not accessible in the usual manner. See *id.*, at 640-641. This situation was distinguishable from the usual method-of-execution claim, because "the gravamen of petitioner's entire claim is that use of the cut-down would be *gratuitous*." *Id.*, at 645 (emphasis in original). Most importantly, the Court distinguished cases seeking to enjoin executions, noting, "Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution *as scheduled*." *Id.*, at 646 (emphasis added).

In other words, the Court believed that issuance of the requested injunction would have permitted the state to complete the execution of the judgment in the criminal case on the day it would have done so without federal court action.[6] This places *Nelson* in the same category of *Muhammad* and *Wilkinson*. See *supra*, at 15.

In practice, allowing such attacks on the State's standard method of execution in last-minute § 1983 litigation *will* impact the enforcement of criminal judgments. Unless every inmate is going to be allowed to specify his individual execution

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6. The *actual* aftermath of *Nelson*, to be described in the *amicus* brief of Alabama, is a different story.

method, the state will have to defend its standard protocol. Hearing that challenge will typically mean a stay of the execution, as happened in this case. Also, as in this case, it will typically mean further delay of justice which is already *very* long overdue. The *Preiser* iine of cases says that habeas is the exclusive remedy if success means interference with the state's criminal judgment, see *supra*, at 15, but "success" in the capital context can include a stay of execution, even if the state ultimately prevails. "Each delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson* v. *Wainwright*, 714 F. 2d 1495, 1506 (CA11 1983).

Nelson should be limited to its unusual facts. Challenge to the State's standard method of execution should be through habeas corpus. When the method is unchanged throughout the proceedings, habeas requires exhaustion of state remedies before the first federal habeas petition and then raising the claim in that petition. Otherwise, the claim is barred.

When, as in this case, the State changes methods after the first federal petition, the inmate must still invoke state remedies, if there are any, at the appropriate time. Hill did not do so, and his claim is defaulted. See *supra*, at 4-5. A claim under the Civil Rights Act does not lie, and there is no point converting this proceeding to a habeas petition.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

April 2006

Respectfully submitted,

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No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner,

v.

JAMES R. MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Habeas Corpus Resource Center is an agency of the Judicial Branch of the State of California. HCRC provides legal representation for indigent petitioners in death penalty habeas corpus proceedings before the California Supreme Court and the federal courts, assists the California Supreme Court by identifying and recruiting private counsel qualified to accept appointments in death penalty habeas corpus proceedings, and provides training and serves as a resource to these attorneys. *See* Cal. Gov't Code § 68661 (West 2006). The HCRC is representing or has represented death row

prisoners in over fifty state and federal habeas corpus proceedings.

The HCRC has an interest in the resolution of this case both in its capacity as counsel to death row inmates and because of its larger responsibility for supporting private counsel. In the second of those roles, HCRC already has been involved in litigation challenging the constitutionality of the method used by the State of California to carry out executions.

The HCRC, therefore, has a particular interest in ensuring that the adjudication of claims relating to the constitutionality of particular methods of execution which may involve "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (lead plurality opinion), are made upon adequately developed, fully informed factual records. It respectfully submits this *Amicus Curiae* brief to explain the importance of permitting factual development of particularized challenges to methods of lethal injection, as illustrated by recent litigation in California, most notably in the case of *Morales v. Hickman*.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk.[1]

STATEMENT OF THE CASE

On January 20, 2006, Mr. Hill, a Florida death row prisoner facing execution by lethal injection, brought an action in federal district court, under 42 U.S.C. section 1983, challenging the State's lethal injection protocol as violative

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[1] Pursuant to this Court's Rule 37.6, we certify that no part of this brief was authored by counsel for any party and no person or entity other than the Habeas Corpus Resource Center made any monetary contribution to the preparation or submission of the brief.

of the Eighth and Fourteenth Amendments to the Constitution. Mr. Hill alleged, in summary, that the particular succession and amounts of three chemicals used in the Florida protocol "will cause unnecessary pain in the execution of . . . [his] sentence of death." Complaint, ¶18. Without permitting any factual development or examining the merits of the claims, the district court denied Mr. Hill's complaint for lack of jurisdiction, stating that it was the "functional equivalent" of a successive habeas petition under 28 U.S.C. section 2244 and that Mr. Hill should have first sought permission from the Eleventh Circuit to file such a petition. *Hill v. Crosby*, ___ F. Supp. ___, 2006 WL 167585 at *2 (N.D. Fla. Jan. 21, 2006).

On January 23, 2006, Mr. Hill appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. The circuit court affirmed, agreeing with the district court that Mr. Hill's section 1983 action was the "functional equivalent" of a successive habeas petition and holding that 28 U.S.C. section 2244 does not permit challenges to a lethal injection protocol to be brought in a successive habeas corpus petition. *Hill v. Crosby*, __ F.3rd ___, 2006 WL 163607 (11th Cir. Jan. 24, 2006).

On January 25, 2006, this Court granted Mr. Hill's petition for certiorari. *Hill v. Crosby*, ___ U.S. ___, 126 S. Ct. 1189 (2006). The petition presents the following two questions:

> 1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?
>
> 2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to

use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

SUMMARY OF ARGUMENT

Mr. Hill's case presents the question of whether the Eleventh Circuit correctly dismissed his complaint challenging Florida's protocol for lethal injection without permitting any factual development bearing on the merits of the claim he pleaded. *Amicus Curiae* urges this Court, particularly in addressing Question 2 of the questions presented for review, to allow Mr. Hill to develop his claim in a manner that accommodates the need for discovery and the making of an adequate factual record in order to support informed Eighth Amendment adjudication of a challenge to a particular lethal injection protocol.

In this regard, the California case of *Morales v. Hickman*, currently pending in the United States District Court for the Northern District of California, is instructive. There, the district court concluded that it properly had jurisdiction to review whether there was an unconstitutional likelihood that Mr. Morales would experience unnecessary and excruciating pain if executed under the California procedures.[2] The district court further determined that, because the State of California solely possessed information critical to resolving Mr. Morales' claim, limited discovery was warranted prior to

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[2] Although there are some differences between the lethal injection protocols of California and Florida, both utilize a mechanical apparatus (rather than a syringe) to inject three drugs to perform the execution. The three drugs are sodium thiopental, a sedative; pancuronium bromide, a neuromuscular blocking agent; and potassium chloride, which is used to induce cardiac arrest. The crux of Mr. Morales' challenge to the California procedure is that some component or the interaction of components of the protocol will result in his not being sufficiently anesthetized by the first chemical when the second and third chemicals are injected.

summary adjudication of the matter. Based on the information discovered, the district court concluded that Mr. Morales has demonstrated "substantial questions" that he would suffer excessive pain if executed under the existing procedures. With the State's input and modification of its execution protocol, the district court then fashioned a limited remedy that, if followed, would have permitted Mr. Morales' execution. The State ultimately was unable to implement its modified protocol or otherwise minimize the unconstitutional risk of an excruciating execution.

As the *Morales* case demonstrates, challenges to lethal injection protocols are extremely complex, fact-intensive litigations that require adequate factual development before a proper determination can be made as to whether a particular protocol passes constitutional muster. *Amicus Curiae* therefore urges this Court to allow Mr. Hill to pursue his challenge to Florida's lethal injection protocol in the lower federal courts so that he may develop a proper record regarding the specifics of the protocol comparable to the record that has been developed, and will be further developed, in *Morales*. *Amicus Curiae* suggests this course because the quality of the record is of paramount importance for informed adjudication of a constitutional question like the one presented in *Hill*. In testing lethal injection procedures against the cruel and unusual punishments guarantee of the Eighth Amendment, the federal courts "must review independently both the legal issues and those factual matters with which they are commingled." *Oyama v. California*, 332 U.S. 633, 636 (1948); *see also* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 608 (1991) ("fact and law in constitutional analysis are bound together").

ARGUMENT

I.

A FULL FACTUAL RECORD MUST BE DEVELOPED BEFORE A COURT MAY PROPERLY REVIEW A CONSTITUTIONAL CHALLENGE TO A STATE'S LETHAL INJECTION PROCEDURES.

The factual development resulting from the recent litigation in *Morales v. Hickman* provides a strong example of why this Court should afford Mr. Hill the opportunity to discover and present evidence challenging Florida's lethal injection procedures. Mr. Morales has developed a record showing that the use of California's existing execution protocol created an undue likelihood that he would suffer intense pain if executed by lethal injection. Mr. Morales' argument was twofold: First, due to the failure to properly sedate the prisoner,[3] there was a substantial probability that he would be conscious and experience excruciating and unnecessary pain when the remaining two drugs were administered.[4] Second, there were recurrent, serious problems with the personnel and apparatus used to administer lethal injections.[5] Although there are some differences between California's lethal injection procedure and Florida's protocol,[6] both states use the same three chemicals during executions and similar methods of delivering the chemicals.

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[3] *See* Part II, at pages 12-16, *infra*.

[4] As the Ninth Circuit noted: "There is no dispute that in the absence of a properly administered anesthetic, Morales would experience the sensation of suffocation as a result of the pancuronium bromide and excruciating pain from the potassium chloride activating nerve endings in Morales' veins." *Morales v. Hickman*, 2006 WL 391604 at *2.

[5] *See* Parts III and IV at pages 16-19, *infra*.

[6] *See Sims v. Florida*, 754 So.2d 657, 666 n.17 (Fla. 2000).

On January 13, 2006, Mr. Morales brought an action in the district court pursuant to 42 U.S.C. section 1983 seeking injunctive relief to prevent the State of California from executing him by means of lethal injection pending the resolution of his action. Mr. Morales alleged that the State's administration of Procedure No. 770,[7] the lethal injection protocol of California's Department of Corrections and Rehabilitation, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it created a substantial likelihood that he would be conscious and in agonizing pain for the duration of the execution process. Mr. Morales specifically alleged that the use of pancuronium bromide and potassium chloride in executing him would cause him to suffer excruciating pain because he would not be properly sedated. Mr. Morales also alleged that California's apparatus for delivering the chemicals was severely flawed and created the danger that a proper dosage of the sedative sodium thiopental would not be delivered.[8] In addition, Mr. Morales alleged that San Quentin's staff was not properly trained to insert intravenous tubes, which increases the risk of inadequate delivery of the sedative.

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[7] Although the State has not made clear how Procedure 770 was developed, it has conceded that no medical personnel were involved in its development and that there has been no medical approval of the procedure.

[8] California's Procedure 770 requires multiple sets of intravenous tubing and extensions because the chemicals are administered to the prisoner from a separate room located behind the gurney on which the prisoner is strapped. It is estimated that approximately fifty feet of intravenous tubing is used to deliver the toxic chemicals to the prisoner. These tubes are connected with various "diaphragms" or adapters. The risk of the chemicals not being properly delivered to the prisoner is greatly increased by the use of such lengthy amounts of tubing, because the tubing can crimp, preventing the chemicals from reaching the prisoner, and the multiple connections increase the risk of leakage.

On the same date, Mr. Morales also filed a motion for discovery, requesting numerous documents. The district court later granted a portion of his request and provided Mr. Morales with the execution logs and handwritten notes of the three most recent California executions,[9] an unredacted version of Procedure 770, and all existing electrocardiograms ("EKGs") of executed prisoners.

Mr. Morales filed a Motion for a Temporary Restraining Order on January 17, 2006, which the district court construed as a motion for a preliminary injunction. The district court held the first hearing on Mr. Morales' motion on January 26, 2006. The main focus of the hearing was to discuss the three most recent executions, as well as whether the use of pancuronium bromide was necessary in the execution protocol given that it would prevent any observer from detecting whether the prisoner was properly sedated. The court ordered additional briefing regarding the three most recent executions, with a timetable that, while expeditious, would allow Mr. Morales' expert to review the recently obtained execution logs and handwritten notes.

At the subsequent hearing, held on February 9, 2006, the district court noted that there were significant problems with the three most recent executions. It was specifically concerned that, in the cases of Stanley "Tookie" Williams and Clarence Ray Allen, the prisoners may not have been properly sedated.[10] The district court also noted that their

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[9] The three most recent executions that California had conducted were those of Donald Beardslee on January 19, 2005; Stanley "Tookie" Williams on December 13, 2005; and Clarence Ray Allen on January 17, 2006.

[10] The district court's findings at this hearing were premised upon the discovery afforded to Mr. Morales, three declarations from Dr. Mark Heath, a Professor of Clinical Anesthesiology at Columbia University Medical Center, and numerous eyewitness accounts of the previous executions. As described more fully

breathing persisted for much longer than the time the State's expert suggested would be expected.[11] In addition, the district court determined that the EKGs provided by the State and used to monitor the prisoners' breathing were scientifically invalid in that they did not indicate the rate of breathing or the time between breaths. The district court found a third declaration provided by Dr. Mark Heath, Mr. Morales's anesthesiology expert, particularly persuasive, and, as a result, requested additional supplemental briefing to address the feasibility of proceeding with Mr. Morales' execution either using only sodium thiopental or utilizing an independent means to ensure that he would be unconscious before pancuronium bromide and potassium chloride were injected.[12]

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below, the recent executions demonstrate that the State continued to experience difficulties administering executions after the same district court had rejected a challenge to lethal injection the previous year. In particular, the execution logs and handwritten notes taken by prison officials during the executions of Mr. Williams and Mr. Allen demonstrate a significant likelihood that both of these prisoners experienced excruciating pain during their executions.

[11] The State's expert opined that a properly sedated prisoner receiving five grams of sodium thiopental would stop breathing within one minute.

[12] The State responded to the district court's order by arguing that it would be "feasible" to execute Mr. Morales by using sodium thiopental alone, but that it might unnecessarily delay the execution as it could take up to forty-five minutes to produce death. The State argued that prior executions had taken 11.3 minutes, on average, to complete. As to the second option, the State responded that it would have the Warden stand in the chamber to assess whether the prisoner was unconscious, rejecting the court's suggestion that persons other than those employed by the Department of Corrections be present in the chamber with the prisoner.

On February 14, 2006, the district court issued an order addressing "the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed." *Morales v. Hickman*, ___F. Supp. 2d ___, 2006 WL 335427 at * 6 (N.D. Cal. Feb. 14, 2006). The court found that Mr. Morales had "raised substantial questions in this regard." *Id.* Specifically, it noted that

> evidence from Defendants' own execution logs that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California raises at least some doubt as to whether the protocol actually is functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia.

Id. at *6. The district court went on to hold that California's Procedure 770 had to be altered to ensure that Mr. Morales would not be conscious during his execution. It gave the State two options: either employ two anesthesiologists to monitor consciousness, or use only the prescribed five grams of sodium thiopental and eliminate the other two drugs from the execution. The district court, however, refused to stay Mr. Morales' execution date of February 21, 2006.

The State chose the option of having two anesthesiologists present during the execution. On February 16, 2006, the district court issued a compliance order detailing the procedure to be followed, most notably ordering that the anesthesiologists "take all medically necessary steps to ensure that [Mr. Morales] is and remains unconscious."

Mr. Morales appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment below. *Morales v. Hickman*, ___ F.3d ___, 2006 WL 391604 (9th Cir. Feb. 19, 2006). The court agreed with the district court that there were troubling questions raised by the record, but it concluded that the lower court's remedy would alleviate the risk of unnecessary pain.

As the execution date approached, however, the anesthesiologists retained by the State learned – apparently belatedly – what they would be expected to do during the procedure, and they refused to participate.[13] On the eve of the execution, the State changed course and decided that it would execute Mr. Morales by the use of sodium thiopental alone. The district court, at a hearing held on February 21, 2006, expressed concern and some skepticism as to how the State could have misinterpreted the court's prior order requiring the anesthesiologists to both monitor unconsciousness and "take all medically necessary steps" to ensure that Mr. Morales would remain unconscious during the administration of all three chemicals. As a result, the district court subsequently entered a very specific compliance order requiring that the personnel administering the sodium thiopental be licensed and properly trained, and directly inject the sedative into Mr. Morales instead of using the extended lengths of tubing called for in Procedure 770. The State declined to conduct the execution under these conditions, stating that it did not want to have any individual present in the execution chamber during the execution. As a result, the execution did not take place before the execution warrant expired. Subsequently, the district court ordered an evidentiary hearing to begin on May 2, 2006.

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[13] Stacy Finz, Bob Egelko, & Kevin Fagan, *Killer's execution rescheduled, delay comes before doctors walk out; new lethal injection set for 7:30 p.m.*, S.F. CHRON., Feb. 21, 2006, at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/21/MNG14HC1HG16.DTL&hw=finz&sn=004&sc=958

II.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT PREVIOUSLY EXECUTED PRISONERS WERE NOT PROPERLY SEDATED BEFORE THEIR EXECUTIONS.

Mr. Morales was enabled to present the district court with evidence that Procedure 770 created an undue likelihood of pain only through a careful development of the record, including limited but significant discovery ordered by the court and provided by the State. Execution logs kept by San Quentin State Prison for prior executions and obtained by Mr. Morales, partly through this court-ordered discovery, were particularly revealing in demonstrating problems with prior executions, and were heavily relied upon by the district court. They provided a basis for Mr. Morales' expert consultant, Dr. Mark Heath, an anesthesiologist familiar with lethal injection protocols throughout the country, to evaluate the actual operation of the California protocol and advise the court about it in a series of four progressively informed declarations.

Consequently, the district court concluded that, at a minimum, six of California's thirteen executions by lethal injection had significant problems related to the risk of improper anesthesia administration. Procedure 770 specifies the use of five grams of sodium thiopental for the stated purpose of anesthesia. Both the State and Mr. Morales agreed that this amount of sodium thiopental, if properly administered, would be sufficient not only to render the prisoner unconscious, but to stop his breathing within one minute and result in death within a few minutes. However, the record developed to date shows that prisoners executed under the protocol have not reacted to the sodium thiopental in this expected fashion.

For example, witness accounts of the execution of Stephen Wayne Anderson suggest that he was not properly

anesthetized when he died. The January 29, 2002 execution log for Mr. Anderson's execution, which the State recently produced to Mr. Morales in discovery, reveals that Mr. Anderson continued breathing until five minutes after the thiopental was administered. This persistent respiratory activity is not consistent with the expected effect of five grams of thiopental, which should stop all visible respiratory activity within a minute of its delivery. In addition, the execution took over thirty minutes, and during that time Mr. Anderson's chest and stomach heaved more than thirty times. Irregular heaving of the chest is not consistent with the depression of the central nervous system caused by sodium pentothal.[14] Rather, chest heaving is indicative of labored respiratory activity, which in turn strongly suggests that Mr. Anderson was conscious, and indeed may have been laboring against the paralyzing effect of the pancuronium bromide.

The execution log of Manuel Babbit's 1999 execution also indicates that he was not fully sedated during the process. A minute after the pancuronium bromide was administered, Mr. Babbit had shallow respirations and brief spasms in his upper abdomen, which is evidence that he was reacting to the effects of the pancuronium bromide. In addition, Mr. Babbit's heart rate remained constant until the potassium chloride was administered; whereas, if the full dose of sodium pentothal had been properly administered and distributed, Mr. Babbit's heart rate would have changed significantly. His distress was evident to witnesses of the execution, one of whom stated that about three or four minutes after Mr. Babbit closed his eyes and took a couple of deep breaths, he had a sudden and extreme convulsion which lasted a few seconds. This witness opined that Mr. Babbit appeared about to break all the restraints when this occurred.

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[14] According to Dr. Heath, the typical reaction to sodium pentothal is yawning, drawing one or two deep breaths, or visibly exhaling so that the cheeks puff out.

Furthermore, a review of Mr. Babbit's execution log shows that he maintained a steady heart rate of between 95 and 96 beats per minute a full seven minutes after the sodium thiopental was administered. If the full five-gram dose of sodium thiopental was properly administered, there would have been significant hemodynamic consequences, including a change of heart rate, during this time period. The log also indicates that Mr. Babbit had spasmodic movements of the upper chest after the pancuronium bromide was administered, similar to what was noted during the Stephen Anderson execution – again raising the concern that Mr. Babbit did not receive the full five grams of sodium thiopental and thus was conscious during the administration of the pancuronium bromide.

The execution logs of William Bonin's 1996 execution also reflect irregularities that may have caused him to die in excruciating pain. Mr. Bonin was given a second dose of pancuronium bromide for reasons that remain unclear, even though the initial dose would paralyze a person for several hours. The redundant dose raises questions about whether Bonin received the initial doses of sodium pentothal and pancuronium bromide; whether the injection team believed that he was still conscious; and, more broadly, whether such an irregularity is indicative of the lack of training or judgment of injection personnel. These accounts of earlier California executions, according to the Ninth Circuit, were "extremely troubling," because they indicate "that there were problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions." *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005).

Evidence developed in the *Morales* litigation relating to more recent executions buttresses this conclusion. The handwritten records of Stanley "Tookie" Williams' execution suggest that the entire dose of sodium thiopental may not have reached Mr. Williams, though none of this information

was recorded in his execution log. The State was not able to explain why the execution log did not contain the information present in the handwritten notes which were taken during the execution. The notes indicate that Mr. Williams did not stop breathing until 12:34 a.m., upon the injection of the potassium chloride, twelve minutes after the thiopental was injected. Thus, the thiopental did not have the effect on Mr. Williams' brain and respiratory activity that would be expected, with a high degree of medical certainty, from the delivery into the circulatory system of the full five-gram dose of thiopental.

The execution log of Clarence Ray Allen states that he continued breathing for nine minutes after the delivery of the thiopental. All evidence demonstrates that five grams of thiopental, if successfully delivered into the circulatory system, would ablate cerebral electrical and respiratory activity.

The March 15, 2000 execution log of Darrell Keith Rich states that Mr. Rich's respirations ceased at 12:08 a.m., with the administration of the pancuronium, but that Mr. Rich had "chest movements" lasting from 12:09 to 12:10 a.m.. These chest movements, beginning after Mr. Rich had ostensibly stopped breathing (and while he was still alive, as shown by his heart rate of 110 beats per minute), and three minutes after the administration of the thiopental, are again inconsistent with proper administration of the thiopental. The chest movements are consistent, however, with an attempt to fight against the accruing paralytic effect of the pancuronium. According to Dr. Heath, if the five-gram dose of thiopental had reached Mr. Rich and had the expected effect, he would not have been able to fight against the pancuronium by attempting to breathe, nor would he even have been aware of the effect of the pancuronium. Indeed, because the sodium thiopental dose, successfully delivered, would have arrested all cerebral activity, including all respiratory drive, there should have been no effort on Mr.

Rich's part to attempt to breathe during the onset of the pancuronium.

III.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT PERSONNEL AT SAN QUENTIN ARE NOT PROPERLY TRAINED TO INSERT INTRAVENOUS LINES.

There has also been a demonstrated problem of incorrect intravenous placement in at least three California executions. Most recently, during the execution of Stanley "Tookie" Williams, the injection team took twelve minutes to insert the intravenous lines. The first line was placed quickly but spurted blood, and the staff struggled for eleven minutes to insert the second line, having so much difficulty that Williams asked whether they were "doing that right." Kevin Fagan, *The Execution Of Stanley Tookie Williams Eyewitness: Prisoner Did Not Die Meekly, Quietly*, S.F. CHRON., Dec. 14, 2005, at A12. The difficulty of the challenge presented to the intravenous team is evidenced by the comment that "[b]y 12:10 a.m., the medical tech's lips were tight and white and sweat was pooling on her forehead as she probed Williams' arm." *Id.* Moreover, the execution log of Williams' execution shows that one of the intravenous lines failed.

Similarly, the execution log of Donald Beardslee's execution indicates that the second intravenous line was inserted with "difficulty," and the time entries indicate that it took twelve minutes to insert the second line, which is consistent with encountering problems in inserting the line. When it proceeds smoothly, placement of a peripheral intravenous should, in Dr. Heath's experience, take on the order of two minutes or less. In the execution of William Bonin, it took the staff assigned anywhere between eighteen and twenty-seven minutes to fashion the intravenous lines.

This is an unusually long period of time for an experienced and properly trained professional.

In the execution of Stephen Anderson on January 29, 2002, one of the persons who attempted to secure an intravenous was unable to do so without causing significant bleeding and the need to remove his gloves. This experience indicates that the process is a difficult one and that it is necessary that those doing it are properly trained and experienced.

IV.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT THE EXECUTION TEAM DEVIATED FROM PROTOCOL BY ADMINISTERING MULTIPLE DOSES OF CHEMICALS AND THAT THESE IRREGULARITIES WERE NOT REPORTED IN EXECUTION RECORDS.

The administration of a second dose of pancuronium (the neuromuscular blocking agent), as indicated in the log of Mr. Bonin's execution on February 23, 1996, was a source of concern to the district court hearing Mr. Morales' case. The court also was concerned when it learned that a second dose of potassium chloride (which burns through the veins to the heart, where it produces intense muscle cramping and eventually cardiac arrest), was administered to three prisoners, including Clarence Ray Allen.[15]

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[15] A declaration provided by Dr. Jack St. Clair of San Quentin State Prison indicates that a second dose of potassium chloride was injected into Mr. Allen, resulting in a flat line and pronouncement of death. The execution logs provided to Mr. Morales in discovery, however, made no mention of a second dose of potassium chloride in Mr. Allen's case or in any other execution. (The district court noted that execution logs had been altered by the State without any indication as to who made the alteration. *Morales v. Hickman*, ___ F. Supp. 2d ___, 2006 WL 335427 at *5

These irregularities led the district court to observe that

> evidence in the present record raises additional concerns as to the manner in which the drugs used in the lethal-injection protocol are administered. For example, it is unclear why some inmates—including Clarence Ray Allen, who had a long history of coronary artery disease and suffered a heart attack less than five months before he was executed, . . . — have required second doses of potassium chloride to stop promptly the beating of their hearts.

Morales v. Hickman, ___F. Supp. 2d ___, 2006 WL 335427 at *6 (N.D. Cal. Feb. 14, 2006).

CONCLUSION

The record developed in the *Morales* case was sufficient to enable the district court to determine that California's execution protocol was riddled with problems that threatened to produce needless, agonizing pain unless the protocol was significantly modified. Mr. Morales could not have developed such a record without court-ordered discovery and hearings through which he was able to obtain and present reliable evidence about the actual functioning of the California protocol. That evidence revealed, among other

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n.12.) Immediately following the Allen execution, on January 17, 2006, Steven Ornoski, Acting Warden of San Quentin State Prison, stated that the injection team was forced to administer a second dose of potassium chloride to Mr. Allen. Warden Ornoski also revealed at this time that the injection team had used a second dose of potassium chloride in two previous executions. *See* Kevin Fagan, *Reporter's Eyewitness Account of Allen's Execution*, S.F. CHRON., Jan. 17, 2006, at http:// www.sfgate.com/cgi-bin/article.cgi?f=c/a/2006/01/17/MNG37GOHD715.DTL&hw=fagan&sn=003&sc=679.

things, a wide chasm between the painless way in which the protocol was theoretically expected to operate and the torturous way it operated in fact.

The Eighth Amendment issues raised by Mr. Hill's section 1983 complaint cannot and should not be addressed without an adequate factual record. Mr. Hill should be permitted to make such a record.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Clarence E. Hill,

Petitioner,

v.

James R. McDonough,
Interim Secretary, Fla. Dep't of Corrections,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF BRADLEY A. MACLEAN AND WILLIAM P. REDICK SUPPORTING PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2 Bradley A. MacLean and William P. Redick request leave to file the attached brief *amici curiae*. For the reasons described in the Interests of the Amici section, *amici* believe that this brief will assist in the Court's consideration of the case. Counsel to *amici* were unable to reach counsel for respondent, necessitating this Motion.

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QUESTION PRESENTED

This brief will address the question whether the lethal injection protocols generally employed in executions comport with the Eighth Amendment to the U.S. Constitution.

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INTEREST OF *AMICI CURIAE*[1]

Amici are counsel to a death row inmate in Tennessee who has been sentenced to die by lethal injection, and whose challenge to the state's lethal injection protocol is currently pending before this Court. *Abdur'Rahman* v. *Bredesen*, No. 05-1036. In the co rse of litigating the constitutional question before the courts of Tennessee, *amici* undertook an extensive review of lethal injection protocols and the dangers that arise under those protocols that condemned inmates will unnecessarily be subjected to extreme pain and suffering during the execution process. While the case currently before the Court concerns the question whether prisoners can use 42 U.S.C. 1983 to challenge execution protocols, it may be useful to the Court in analyzing that question to understand the grave Eighth Amendment concerns posed by common execution protocols. The particular expertise developed by *amici* should aid the Court's consideration of the issues raised by this case.

STATEMENT

This Court granted certiorari to decide whether a condemned prisoner may challenge the protocol under which he will be executed in an action under 42 U.S.C. 1983 or whether such an action is instead properly characterized as a prohibited successive habeas application. In the view of *amici*, the question whether Congress intended to permit such a suit is properly informed by an understanding of the substantial constitutional claim that the state's position would preclude. *Amici* in this brief accordingly addresses the merits of the underlying Eighth Amendment claim presented by cases such as this one.

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[1] No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

Thirty-five states use a three-drug cocktail for executing condemned prisoners. See *Evans* v. *Saar*, 2006 WL 274476, at *2 (D. Md. Feb. 1, 2006). Although there is some variation among the procedures used, the primary components are the same. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradoxes Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 97-99 (2002). The principal features are the use of sodium thiopental (also commonly known as sodium Pentothal), Pavulon, and potassium chloride. *Ibid.*

Since the adoption of the first lethal injection protocol by Oklahoma in 1977, other states have essentially copied existing protocols, without any independent analysis or scientific investigation, and with little or no legislative attention to the form of the particular protocol employed. Henry Weinstein, *State Will Help Shape Fate of Lethal Injection*, L.A. TIMES, Feb. 23, 2006, at A1 (quoting Kent Scheidegger, legal director of the Criminal Justice Legal Foundation in Sacramento, as noting that "states just seemed to copy [the Oklahoma protocol] without much scientific backup for what they adopted"); see *infra* note 10. Tennessee, for example, "copied other states in developing its method." *Abdur'Rahman* v. *Sundquist*, No. 02-2236-III, slip op. at 9 (Tenn. Ch. Ct. filed June 1, 2003).[2] An ad hoc committee

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[2] There is also little doubt that Florida, the state in which petitioner is scheduled to be executed, copied other states, particularly Texas, in adopting its protocol in 2000. Not only is the Florida protocol typical in using a three-drug chemical combination, Denno, *supra*, at 146, but Florida also specifically uses two grams of sodium Pentothal, just like Texas. Compare *Sims* v. *State*, 754 So. 2d 657, 666 n.17 (Fla. 2000), with Leonidas G. Koniaris et al., *Inadequate Anesthesia in Lethal Injection for Execution*, 356 LANCET 1412, 1412 (2005) (usual dosage in Texas and Virginia is two grams). See also COMMITTEE ON CRIMINAL JUSTICE, THE FLORIDA SENATE, A MONITOR: METHODS OF EXECUTION & PROTOCOL (1997), available at http://www.fcc.state.fl.us/fcc/reports/monitor/contmon.html (last

composed of Department of Correction personnel[3] adopted the state's protocol without consulting physicians or any other persons with medical or scientific training, *id.* at 2, and without seeking any public input, *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292, 300 (Tenn. 2005).

This wholesale imitation has produced a number of serious problems. For example, state officials have included Pavulon in their protocols although the drug serves no function in the execution, neither anesthetizing nor killing the prisoner. Denno, *supra*, at 100. What Pavulon *does* do is to paralyze the prisoner, which can make him feel that he is suffocating to death if he is not properly anesthetized. *Beardslee* v. *Woodford*, 395 F.3d 1064, 1071 (CA9), cert. denied, 125 S. Ct. 982 (2005). The possibility of such cruel, conscious suffering has resulted in thirty states passing laws "banning, in whole or in part, the use of neuromuscular agents as a means of euthanizing animals." See *infra* at 17-18.

Additionally, most states do not even mention training in their protocols. Denno, *supra*, at 121. "Criteria for selecting or training executioners in these states appear to be nonexistent." *Id.* at 122. Even in states like Virginia and Texas, where the cocktail is often administered by emergency medical technicians, those technicians are not trained to administer anesthesia. Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412, 1412 (Apr. 16, 2005).

Further, protocols generally fail to account for the varying size and medical history of prisoners – facts critical to

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visited Mar. 3, 2006) (a survey of other states' execution methods, particularly focusing on Texas in connection with lethal injection).

[3] As in twenty other states, Tennessee's legislature delegated the task of developing an execution protocol to state administrative officials. See Tenn. Code Ann. 40-23-114; see also *infra* note 9.

dosage decisions.[4] Denno, *supra*, at 109-10. Indeed, most states fail even to specify the dosage that the executioners are to use under normal circumstances, making it difficult to ascertain whether the amount used is proper in any particular case. *Id.* at 99. Many states' protocols, including those of Tennessee and Texas, also call for remote administration of the anesthesia, *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4; Koniaris et al., *supra*, at 1412, and fail to require the executioner to verify that the prisoner is anesthetized before proceeding, *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4. Additionally, under the Tennessee protocol the syringes are not labeled with the chemical name, but rather are color-coded – a feature that substantially increases the likelihood of error in administering the cocktail. *Ibid.* All of these factors create a realistic risk that a prisoner might be insufficiently anesthetized when the Pavulon takes effect. Denno, *supra*, at 109.

Finally, the Tennessee Department of Correction's policy regarding storage of the perishable cocktail components is also flawed. Although Department of Correction personnel are aware that sodium Pentothal has a short shelf life, the anesthetic is at times stored for more than six months before use, making it likely that the mixture will lose some of its potency. 3 Trial Tran. 273-76, 321 (*Abdur'Rahman* v. *Sundquist*, No. 02-2236-III (Tenn. Ch. Ct.)). Additionally, the sodium Pentothal powder must be mixed with sterile water before the execution – a procedure necessary to ensure that the proper amount is administered, and yet one performed by the Warden, who possesses neither medical nor scientific training. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 3. Contamination of the solution during mixing can also reduce its potency. 2 Trial Tr. 129-30 (*Abdur'Rahman* v. *Sundquist*, No. 02-2236-III (Tenn. Ch. Ct.)).

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[4] The protocol also fails to take into account the fact that sodium Pentothal can, if improperly administered, actually cause heightened sensitivity to pain. See *Sims*, 754 So. 2d at 668 n.19.

Various protocols also create unique risks of error. The Florida protocol, for example, specifically provides that a prisoner be served his last meal an hour before the execution, *Sims*, 754 So. 2d at 657 n.18 – a practice contrary to standard anesthesia protocols prohibiting the consumption of food or fluid so close in time to the administration of sodium Pentothal. See Denno, *supra*, at 123. Only six other states prescribe the amount of time that must pass between a prisoner's last meal and administration of the sodium Pentothal. *Ibid.* The range varies from two to three hours, as required by Texas, and not less than eight hours, as required by New Jersey. *Ibid.*

All of these flaws in the lethal injection protocols employed in Tennessee and elsewhere increase the likelihood that the sodium Pentothal will not work as intended and thus that the prisoner will not be adequately anesthetized. "The evidence is essentially uncontradicted that the injection of either Pavulon or potassium chloride, by themselves, in the dosages required by Tennessee's three-drug protocol would cause excruciating pain." *Abdur'Rahman* v. *Bredesen*, No. M2003-01767-COA-R3-CV, 2004 Tenn. App. LEXIS 643, at **62-63 (Tenn. Ct. App. Oct. 6, 2004). If the Pavulon is administered while the prisoner still has sensation, the prisoner will be able to think and experience pain and fear; as his diaphragm and lungs are paralyzed by the Pavulon, he will feel himself being asphyxiated. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 5. And while that is happening, he will be utterly incapable of expressing the fact or extent of his suffering. *Ibid.* The potassium chloride used in these protocols will also "cause extreme pain and suffering" if the sodium Pentothal does not have its intended anesthetic effect. *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d at 307. "Without sedation, the injection of potassium chloride would * * * deliver the maximum amount of pain the veins can deliver." *Abdur'Rahman* v. *Bredesen*, 2004 Tenn. App. LEXIS 643, at *63 (internal quotation omitted).

ARGUMENT

I. The Needless Use of Pavulon in Florida's Execution Protocol Is Unconstitutional Under This Court's Precedents.

The lethal injection protocols challenged in this and similar cases give rise to substantial claims of Eighth Amendment violations. There is no reason to think that Congress would have intended the habeas statutes to immunize the states from such claims.

A. The Purposeless Use of Pavulon Reflects the States' Deliberate Indifference to the Risk of Needless Suffering.

1. As both courts and experts have found, Pavulon serves no legitimate purpose in an execution by lethal injection. See, *e.g.*, *Beardslee* v. *Woodford*, 395 F.3d 1064, 1075-76 (CA9) (describing California's failure to explain inclusion of Pavulon in its execution protocol as, "to say the least, troubling"), cert. denied, 543 U.S. 1096 (2005); *Abdur'Rahman* v. *Sundquist*, No. 02-2236-III, slip op. at 13 (Tenn. Ch. Ct. filed June 1, 2003); *cf.* Adam Liptak, *Critics Say Execution Drug May Hide Suffering*, N.Y. TIMES, Oct. 7, 2003, at A7 (reporting comment of Dr. Sherwin B. Nuland: "it makes no sense to use a muscle relaxant in executing people"). Indeed, as the Tennessee Supreme Court emphasized, on the state's view that the prison officials will implement the protocol flawlessly, the first drug – "a dosage of five grams of sodium Pentothal" – will "cause[] nearly immediate unconsciousness and eventually death." *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292, 307-08 (Tenn. 2005).

Because the use of Pavulon – or, for that matter, potassium chloride – in the execution protocol serves no legitimate purpose, it has only three possible effects. First, if the prisoner is not properly anesthetized, the Pavulon will

"cause extreme pain and suffering" as he begins to asphyxiate. *Abdur'Rahman*, 181 S.W.3d at 307. Second, the Pavulon will paralyze all of the prisoner's voluntary muscles, creating a "chemical veil" that precludes correctional officials and witnesses (including the prisoner's attorney) from detecting the extraordinary pain suffered by him as a result of the Pavulon-induced asphyxiation and, subsequently, the potassium chloride. *Id.* at 302. Finally, even if the sodium Pentothal is properly administered, the Pavulon effectively "sanitizes" the execution for onlookers by "prevent[ing] seizures that often occur after cardiac arrest induced by the administration of potassium chloride that could be interpreted erroneously by lay observers as pain or discomfort." *Beardslee*, 395 F.3d at 1076 n.13 (citing testimony of the state's expert witness).

It is well established that imposing a pointless risk of extraordinary pain is unconstitutional. The Eighth Amendment prohibits punishment that involves "torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), or "the unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976); *Hope* v. *Pelzer*, 536 U.S. 730, 737 (2002) ("[A]mong unnecessary and wanton inflictions of pain are those that are totally without penological justification.") (internal quotations omitted).

The officials who promulgated and who carry out these execution protocols have displayed precisely the kind of deliberate indifference to pointless suffering that this Court has repeatedly deemed unconstitutional in cases such as *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment.") (citation omitted), and *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993). Further, one "may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious." *Hope*, 536 U.S. at 738 (citing *Farmer* v. *Brennan*, 511 U.S. 825, 842 (1994)).

The enormous risks inherent in the lethal injection protocols have long been obvious. Indeed, even before the first execution by lethal injection, condemned prisoners in Texas and Oklahoma argued that the newly adopted protocols "may actually result in agonizingly slow and painful deaths that are far more barbaric than those caused by the more traditional means of execution." *Inmates Ask Ban on Drugs as Method of Execution*, N.Y. TIMES, Jan. 8, 1981, at A13 (citing the petition in *Chaney* v. *Heckler*). And in 1983, the D.C. Circuit found that the prisoners "ha[d] presented substantial and uncontroverted evidence to support their claim that execution by lethal injection poses a serious risk of cruel, protracted death," noting that "[e]ven a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." *Chaney* v. *Heckler*, 718 F.2d 1174, 1191 (1983) (citations omitted), rev'd on other grounds, 470 U.S. 821 (1985); *cf.* Resps. Br. 90 n.44, *Heckler* v. *Chaney*, 470 U.S. 821, No. 83-1878 (1985) (citing an expert for plaintiff-respondent prisoners: "The determination of the proper dosage of drugs for a lethal injection would also be a difficult task * * *. If thiopental and tubocurarine were given in sequence, one might not be effective before the other. For example, if not enough thiopental were given and it were followed by curare, the prisoner could be awake and he would die in physical and mental agony.").[5] Similarly, the medical community expressed public concern regarding the prospect of technical problems in finding a vein and adjusting dosages. See William J. Curran & Ward Casscells, *The Ethics of*

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[5] Both Pavulon and tubocurarine are "chemical paralyzing agents" that were considered in connection with the original Oklahoma protocol. Denno, *supra*, at 98 n.223. Pavulon is also a member of the "curariform class of drugs." MICROMEDEX HEALTHCARE SERIES: DRUGDEX: DRUG POINT, *Pancuronium Bromide*, available at www.micromedex.com (last visited Mar. 5, 2006).

Medical Participation in Capital Punishment by Intravenous Drug Injection, 302 NEW ENG. J. MED. 226, 228-29 (1980) (pointing out that preparation of the chemicals "would require special knowledge" and noting the dearth of information about who will prepare the substances); Br. of the Am. Soc'y of Law and Medicine et al. as *Amici Curiae* Supporting Respondents 13-14, *Heckler* v. *Chaney*, 470 U.S. 821, No. 83-1878 (1985) (noting routine difficulty in finding veins); see also Herb Haines, *Primum Non Nocere: Chemical Execution and the Limits of Medical Social Control*, 36 SOC. PROBS. 442, 448 (1989) (citing other medical writers who in the early 1980s "noted the possible technical difficulties that might complicate such procedures").

These concerns about the protocol have been borne out, as myriad problems involving executions by lethal injections have been well documented.[6] See, *e.g.*, Denno, *supra*, at 139-41 (documenting thirty-one botched executions between 1982 and 2001 and citing additional sources for that information); see also *Morales* v. *Hickman*, 2006 WL 335427, at **5-6 (N.D. Cal. 2006) (noting that six executions in California since 1999 may have involved a prisoner still conscious when Pavulon was administered); Herb Haines, *Flawed Execution, the Anti-Death Penalty Movement, and the Politics of Capital Punishment*, 39 SOC. PROBS. 125, 128, 134 tbl.2 (1992) (explaining that problems with executions are particularly likely to receive attention from the press, and noting that eleven out of twelve technical malfunctions received press coverage); Jennifer McMenamin, *Lethal Injection Debates: Heroin Scars Pose* Evans *Complication*, BALT. SUN, Jan. 28, 2006, at 1B (reporting on expert testimony of possibility of botched execution of prisoner in Maryland in 2004).[7]

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[6] A "botched execution" is one in which complications arose that resulted in the inmate undergoing pain and suffering that would not occur in an error-free execution.

[7] A high ratio of failure is consistent with the estimated error rate of at least one prominent expert. See Charles M. Madigan, *A*

Given these well-documented problems,[8] state officials are indisputably aware of the risks inherent in their states' lethal injection protocol. Indeed, despite the secrecy that often shrouds state lethal injection protocols, see Denno, *supra*, at 116-17, state officials are known to have been specifically aware of problems with previous executions by lethal injection. See, *e.g.*, Trial Ex. 14; 2 Trial Tr. 264, 271; *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 13 (Tennessee officials aware of previous problems in Texas and Arkansas and in their own state's practice sessions); COMMITTEE ON CRIMINAL JUSTICE, THE FLORIDA SENATE, A MONITOR: METHODS OF EXECUTION & PROTOCOL (1997), available at http://www.fcc.state.fl.us/fcc/reports/methods/emstates.html (last visited Mar. 4, 2006) (demonstrating awareness of problems encountered in other states with lethal injection). State officials have also not re-evaluated the risks associated with the drugs employed in the typical lethal injection protocol in light of the fact that the use of neuromuscular blocking agents such as Pavulon is prohibited for animal euthanasia in thirty states, see *infra* note 11.

Despite their awareness of the risks involved, states do not even take the simple step of assuring by physical examination that a prisoner has reached a surgical plane of anesthesia before administering drugs that undisputedly would cause pain to an inadequately anesthetized individual.

Federal Killing; Q&A with Dr. Edward Brunner; It's Only a Painless Death if You're the One Watching, CHI. TRIB., Apr. 22, 2001, at C1 ("We know that in about 40 percent of cases where lethal injection has been used, there has been misuse in one way or another * * *.").

[8] Ironically, the fact that these concerns about the protocols have long been recognized has even been used *against* condemned inmates seeking review of the method of execution. See *Harris* v. *Johnson*, 376 F.3d 414, 419 n.4 (CA5 2004) ("Harris's own filings demonstrate that the substance of his complaint has been factually available for the entirety of his term on death row [since 1986].").

As such, the problems inherent in lethal injection protocols cannot be dismissed as the kind of "unforeseeable accident" that this Court has declined to hold unconstitutional. See *Estelle*, 429 U.S. at 105 (quoting *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 464 (1947)). Rather, the problems described are the direct and inevitable consequence of a poorly designed protocol carried out by unqualified personnel.

The fact that this conscious disregard is widespread does not immunize it from attack. A state surely could not, consistent with the Eighth Amendment, adopt a protocol that would omit the sodium Pentothal for every one-hundredth condemned prisoner, torturing that prisoner to death. It would make no difference in that case if *all fifty* states did the same thing. It should similarly make no difference that the prospect of a tortuous death arises from the known risk of a preventable accident when the State imposes that risk for no purpose whatsoever.

2. Nor is it any answer to a prisoner's Eighth Amendment claim that the risk of inadequate anesthesia – and, thus, the likelihood that a prisoner will suffer severe pain from the Pavulon and potassium chloride – is small.

First, even if the risk were small, there is simply no need to expose anyone to such a risk given that the use of Pavulon (and potassium chloride) is both entirely gratuitous and could cause inhuman pain. See *supra* at 5-7. That risk is particularly unreasonable given that simpler and more humane alternatives – such as a single dose of pentobarbital – are not only readily available, but in fact widely used in animal euthanasia. See *Abdur'Rahman* v. *Bredesen*, No. M2003-01767-COA-R3-CV, 2004 Tenn. App. LEXIS 643, at **23-24 (Tenn. Ct. App. Oct. 6, 2004).

Second, the mere presence of the risk injures prisoners facing the prospect of death by lethal injection. This Court has long held that the Eighth Amendment protects not only against "physical mistreatment [and] primitive torture," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), but

also against undue psychological injury, including a "fate of ever-increasing fear and distress," *id.* at 102. Here, a prisoner will likely experience extreme psychological terror simply from knowing that, as a result of the myriad flaws in protocols such as Florida's, and in mute and unacknowledged terror, he may experience extraordinary pain from the effects of the Pavulon and potassium chloride.

3. In any event, the risk that a prisoner will suffer extraordinary pain as a result of flaws in the lethal injection protocol is genuine. There are many types of needless risks that any prisoner exposed to a protocol that uses a neuromuscular blocking agent, like Pavulon, after an ultra-fast acting barbiturate, like sodium Penothal, must face. See *supra* at 3-5. These risks are exacerbated when states adopt an overly complex method for delivering the drugs. In Tennessee, for example, the unnecessary injection of two syringes of Pavulon, coupled with the syringe of saline solution required to prevent the sodium Pentothal from crystallizing on contact with the Pavulon, substantially increases the length and complexity of the procedure. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4. Similarly, in Florida, eight syringes are used, *Sims*, 754 So. 2d at 665 n.17, and in Oklahoma, "three lay-executioners * * * plunge eleven hand held syringes in a confusing and complicated sequence to deliver the deadly drugs." Compl. 11, *Anderson* v. *Evans*, No. CIV-05-0825F, 2006 U.S. Dist. LEXIS 1632 (W.D. Okla. 2006).

B. Use of Pavulon in Lethal Injection Protocols Is Not Supported by Evolving Standards of Decency and Is in Any Case Unconstitutional Under Other Eighth Amendment Standards.

1. In determining whether a form of punishment is cruel or unusual, this Court has often looked to "the 'evolving standards of decency that mark the progress of a maturing society.'" *Roper* v. *Simmons*, 543 U.S. 551, 561 (2005)

(quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)). To the maximum extent possible, courts should infer those standards from objective evidence. *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002). As this Court has stated, "[t]he clearest and most reliable" such evidence is "the legislation enacted by the country's legislatures." *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989), overruled on other grounds, *Atkins*, 536 U.S. 304. In this case, however, the widespread use of very similar lethal injection protocols cannot be said to reflect any legislative consensus or determination that such protocols are appropriate, much less that they reflect contemporary values. First, although thirty-five states use a three-cocktail protocol composed of sodium Pentothal, Pavulon, and potassium chloride, twenty-one of those states – including Tennessee and Florida – did not enact legislation that specifically prescribed the form of the protocol.[9] As such, those states could not have made any legislative determination that the lethal injection protocols employed by correctional officials reflected contemporary values. Cf. *Thompson* v. *Oklahoma*, 487 U.S. 815, 826 (1988) (plurality opinion) (in considering constitutionality of death penalty for fifteen-year-olds, declining to consider states that either prohibited capital punishment or failed to explicitly set a minimum age for the

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[9] See Ala. Code 15-18-82.1; Ariz. Rev. Stat. Ann. 13-704; Cal. Penal Code 3604(a); Conn. Gen. Stat. 54-100(a); Del. Code Ann. tit. 11, 4209(f); Fla. Stat. 922.105(1); Ga. Code Ann. 17-10-38(a); Ind. Code 35-38-6-1(a); Ky. Rev. Stat. Ann. 431.220(1)(a); La. Rev. Stat. Ann. 15:569B; Mo. Rev. Stat. 546.720; Nev. Rev. Stat. 176.355; Ohio Rev. Code Ann. 2949.22(A); S.C. Code Ann. 24-3-530(A); Tenn. Code Ann. 40-23-114; Tex. Code Crim. Proc. Ann. art. 43.14; Utah Code Ann. 77-18-5.5; Va. Code Ann. 53.1-233; Wash. Rev. Code 10.95.180. Although neither Kansas nor New York prescribes the form of the protocol, see Kan. Stat. Ann. 22-4001(a); N.Y. Correct. Law 658, courts in those states have held the states' death penalty statutes unconstitutional, see *State* v. *Marsh*, 102 P.3d 445 (Kan. 2004), cert. granted, 125 S. Ct. 2017 (2005); *People* v. *LaValle*, 817 N.E.2d 341 (N.Y. 2004).

death penalty, explaining that "[i]f * * * we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn"). Instead, those states merely enacted a statute that deemed lethal injection an approved or preferred method of execution and left it to state administrative officials to determine the protocol for carrying out that legislative judgment. In developing the protocol, those state officials consistently failed both to invite public comment and to make any inquiry into prevailing community standards; indeed, in some states, details of the protocol are not even made available to the public once established. See, *e.g.*, *Harris* v. *Johnson*, 376 F.3d 414, 420 (CA5 2004) (Dennis, J., dissenting) (noting that Texas has refused to "disclose any reliable information regarding [its] unpublished non-statutory lethal injection protocol"); Denno, *supra*, at 181, 207-60 (noting that same states, like Kentucky, Mississippi, New Hampshire, and Wyoming, have no written protocol, and that the protocols of other states, including Nevada, Pennsylvania, South Carolina, and Virginia, are not public information).

Even in the fourteen states that have enacted legislation specifically requiring the use of particular drugs in the lethal injection protocol, the legislation does not expressly require the use of particular drugs, but instead merely prescribes the use of certain types of drugs – generally an "ultra-short-acting barbiturate" (such as sodium Pentothal) and a "chemical paralytic agent" (such as Pavulon) – in a certain sequence. Moreover, as the language of those states' lethal injection statutes suggest, it appears likely that those states simply copied the statute created by the Oklahoma legislature[10] – the

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[10] For example, Idaho and New Mexico (two of the first four states to move to lethal injection) adopted the Oklahoma statute almost verbatim. Compare Okla. Stat. tit. 22.1014 ("The punishment of death must be inflicted by continuous, intravenous

first state to adopt lethal injection as an available method of

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administration of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a licensed physician * * *."), with Idaho Code Ann. 19-2716 ("The punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until death is pronounced by a physician * * *."), and N.M. Stat. 31-14-11 ("The manner of inflicting punishment of death shall be by administration of a continuous, intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.").

The copycatting trend continued as more states adopted lethal injection as the preferred or exclusive method of execution. See Ark. Code Ann. 5-4-617 (prescribing use of an "ultrashort-acting barbiturate in combination with a chemical paralytic agent"); Md. Code Ann., Corr. Servs. 3-905 (same); Miss. Code Ann. 99-19-51 (same); Mont. Code Ann. 46-19-103 (same); N.H. Rev. Stat. Ann. 630:5 (same); N.J. Stat. Ann. 49:2C (same); N.C. Gen. Stat. 15-187 (same); 61 Pa. Stat. Ann. 3004 (same); S.D. Codified Laws 23A-27A-32 (same); Wyo. Stat. Ann. 7-13-904 (same); see also *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 13 ("[Tennessee] 'copy-catted,' using what a majority of other states were doing, including the use of Pavulon."); Opp'n to Emergency Motion for Stay of Execution at 37, *Cooper* v. *Rimmer*, 379 F.3d 1029 (CA9 2004) (No. 04-99001) (according to the Attorney General of California, "[i]n developing California's lethal-injection protocol, the Warden of San Quentin consulted other wardens and visited Texas and observed their procedures being carried out by witnessing an execution"); Keith Epstein, *Cruel and Unusual?*, TAMPA TRIB., Feb. 21, 2006, at 1 ("The [Oklahoma] technique spread, to Texas and then other states without much investigation or planning, although the original Oklahoma potion involved two drugs, not three."); Tony Rizzo, *Painless or Cruel, Unusual?*, KAN. CITY STAR, Feb. 12, 2006 at A1 ("Texas copied and passed the law the day after Oklahoma did."); Kevin Simpson, *Debate Flares over Injections: Critics Say Lethal Shots Not Humane*, DENVER POST, Sept. 15, 1997, at A1 (discussing Colorado officials studying Texas protocol).

execution. Had Oklahoma's decision been the result of considerable discussion and had it reflected the prevailing views of both the medical community and the public, other states' verbatim adoption of Oklahoma's statute might be reasonable. To the contrary, however, the Oklahoma statute appears to reflect the suggestion of a single doctor. See Denno, *supra*, at 95-97. Accordingly, neither the decision of the Oklahoma legislature nor the subsequent adoption of that protocol by other states can be said to represent the reasoned judgments of state legislators or the views of the citizens thereby represented.

2. Furthermore, societal consensus regarding standards of decency is properly measured by looking at the entire array of laws that illuminate how society thinks about the practice being challenged under the Eighth Amendment. In *Roper* v. *Simmons*, for example, this Court referred to an array of legislation recognizing the comparative immaturity and irresponsibility of juveniles in holding that the juvenile death penalty violated society's evolving standards of decency. 543 U.S. at 569.

Here, the widespread prohibition on the use of neuromuscular blocking agents such as Pavulon in animal euthanasia reflects a national consensus that Pavulon is an inhumane method of causing death. Thirty states – twenty-three of which impose capital punishment – prohibit the use of Pavulon in euthanizing animals. [11] These laws are

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[11] Nine states, including Florida and Tennessee, ban neuromuscular agents explicitly. See Fla. Stat. 828.058 & 828.065; Ga. Code Ann. 4-11-5.1; Me. Rev. Stat. Ann. tit. 17, 1044; Md. Code Ann., Crim. Law, 10-611; Mass. Gen. Laws ch. 140, 151A; N.J. Stat. Ann. 4:22-19.3; N.Y. Agric. & Mkts. Law 374; Okla. Stat. tit. 4, 501; Tenn. Code Ann. 44-17-303.

Twenty-one more states prohibit the use of such neuromuscular blocking agents by implication, either by specifically mandating a method for animal euthanasia that does not involve the use of a neuromuscular blocking agent or by

particularly instructive because they reflect a considered judgment by the legislatures that enacted them. See *Thompson*, 487 U.S. at 829 (examining only the states that had "expressly established a minimum age in their death penalty statutes").

Moreover, this widespread legislative consensus is consistent with the national ethical standards promulgated by the American Veterinary Medical Association's Panel on Euthanasia. The Panel has deemed "unacceptable" and "absolutely condemned" the use of neuromuscular blocking agents for animal euthanasia. American Veterinary Medical Association Panel on Euthanasia, *1993 Report of the AVMA Panel on Euthanasia*, 202 J. A.V.M.A. 229 (1993); American Veterinary Medical Association Panel on Euthanasia, *2000 Report of the AVMA Panel on Euthanasia*, 218 J. A.V.M.A. 669, 675, 681 (2001). Instead, the AVMA standards require that a medically qualified individual stay in constant contact with the patient to be euthanized so that an assessment of muscle tone and breathing can be made and an accurate assessment of patient pain or distress can be made. The same concerns animating the prohibition on the use of neuromuscular blocking agents to euthanize animals apply equally to the use of Pavulon in executing humans: *viz.*, the risk that the animal will be inadequately anesthetized and thus (without the knowledge of the veterinarians administering the

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otherwise expressing a legislative preference for sodium pentobarbital: Ala. Code 34-29-131; Alaska Stat. 08.02.050; Ariz. Rev. Stat. Ann. 11-1021; Cal. Bus. & Prof. Code 4827; Colo. Rev. Stat. 18-9-201; Conn. Gen. Stat. 22-344a; Del. Code Ann. tit. 3, 8001; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. 47-1718(a); La. Rev. Stat. Ann. 3:2465; Mich. Comp. Laws 333.7333; Mo. Rev. Stat. 578.005(7); Neb. Rev. Stat. 54-2503; Nev. Rev. Stat. Ann. 638.005; Ohio Rev. Code Ann. 4729.532; Or. Rev. Stat. 686.040(6); R.I. Gen. Laws 4-1-34; S.C. Code Ann. 47-3-420; Tex. Health & Safety Code Ann. 821.052(a); W. Va. Code 30-10A-8; Wyo. Stat. Ann. 33-30-216.

drugs) fully conscious while suffocating. *Abdur'Rahman* v. *Sundquist*, Ch. Ct. slip op. at 4.

3. Although the Eighth Amendment "draw[s] its meaning from * * * evolving standards of decency," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), this Court's cases "also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stevens, Stewart, and Powell, JJ.). Thus, as this Court has recognized, the Eighth Amendment prohibits punishment that involves "torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). Relying on this prohibition, at least one circuit has held for a decade that a lingering death by asphyxiation – precisely the kind of death that a prisoner would suffer if inadequately anesthetized – would violate the Eighth Amendment. See *Beardslee* v. *Woodford*, 395 F.3d 1064, 1070 (CA9) (construing *Fierro* v. *Gomez*, 77 F.3d 301, 308 (CA9), vacated on other grounds, 519 U.S. 918 (1996)), cert. denied, 543 U.S. 1096 (2005). In *Beardslee*, the court of appeals explained that its holding in *Fierro* – which deemed California's lethal gas execution protocol unconstitutional – rested on the district court's finding that "inmates were likely to remain conscious for up to a minute after the execution procedure commenced and that there was a substantial likelihood that some consciousness would persist for several minutes during which 'inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells.'" *Ibid.*

Even putting aside the risk that a prisoner will suffer extreme pain as a result of a flawed lethal injection protocol, the lethal injection protocols are unconstitutional for the further reason that they violate the prisoner's human dignity, which is "[t]he basic concept underlying the Eighth Amendment." *Trop*, 356 U.S. at 100. Specifically, it is deeply offensive to a prisoner's dignity to be subjected to the use of Pavulon when thirty states have expressly deemed that drug inappropriate for euthanizing animals. As Justice Brennan

explained in *Furman* v. *Georgia*, "[m]ore than the presence of pain * * * is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings." 408 U.S. 238, 272 (1972) (Brennan, J., concurring). Rather, the "true significance of these [barbaric] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded." *Id.* at 272-73. The use of Pavulon goes even further, reducing prisoners subjected to such treatment to less than animals in the eyes of the law.

The subjugation of prisoners to inhumane treatment also corrodes the integrity of the criminal justice system, which, as this Court has explained, "depends on full compliance with the Eighth Amendment." *Johnson* v. *California*, 543 U.S. 499 (2005). That integrity is undermined when, as here, there is a realistic risk that a prisoner will undergo extraordinary physical and psychological pain as a result of drugs that are entirely unnecessary to the execution. The use of Pavulon in the protocol is all the more objectionable for its effect of masking the suffering that the protocol inflicts, thereby enabling executioners and witnesses to suspend disbelief and imagine a humane death. See Denno, *supra*, at 100.

C. It Is Important that Prisoners Have Adequate Legal Channels, Including § 1983 Actions, Through Which To Challenge Unconstitutional Means of Execution.

Given the substantial risk of unnecessary pain and suffering that lethal injection protocols like Florida and Tennessee's present, it is essential that prisoners have access to the legal channels that § 1983 provides so that they may challenge that means of execution, regardless of whether state remedies are available to them. As this Court stated over forty years ago in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), overruled on other grounds, *Monell* v. *N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 664-89 (1978), "[i]t is no answer that the State has a law which if enforced would give relief. The

federal remedy [provided by § 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." "Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990).

In any event, the availability of state remedies to challenge a lethal injection protocol is very much in doubt. In the majority of states using the lethal injection protocol similar to the one at issue in this case, the particular protocol used is not mandated by state law, but is instead the result of an administrative decision made by a state's department of corrections. See *supra* at 13-14. And while most states provide some mechanism to challenge administrative decisions generally, see *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292, 2005 (Tenn. 2005) (challenging Tennessee lethal injection protocol under that state's Administrative Procedures Act, which provides for judicial review of final administrative decisions), many have specifically exempted the decisions of departments of corrections from judicial review. Indeed, among the five states that have executed the most prisoners since 1976, four of them – Texas, Virginia, Oklahoma, and Florida –[11] have just such an exclusion.[12] Together, these states have accounted for nearly sixty percent of all executions since 1976.[13]

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[12] See Fla. Stat. Ann. 120.52(12)(d); Okla. Stat. Ann. tit. 75, 250.4(A)(10); Va. Code Ann. 2.2-4002(B)(9); Tex. Gov't Code Ann. 2001.226. Statistics on executions since 1976 by state are from Death Penalty Information Center, available at http://www.deathpenaltyinfo.org/article.php?scid=8&did=186 (last visited Mar. 1, 2006).

[13] Other states providing a similar exception to their administrative procedure acts for rules pertaining to the incarcerated include: Arkansas, Ark. Code Ann. 25-15-212(a); Georgia, Ga. Code Ann. 50-13-2(1); Indiana, Ind. Admin. Code tit.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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4, 21.5-2-5(6), and Ohio, see *State* v. *Brown*, 804 N.E.2d 1021, 1023 (Ohio Ct. App. 2004).

(7)

MAR 6 - 2006

No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. McDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NEW JERSEYANS FOR ALTERNATIVES TO THE DEATH PENALTY IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1999, *amicus curiae* New Jerseyans for Alternatives to the Death Penalty (NJADP) (formerly known as New Jerseyans for a Death Penalty Moratorium (NJDPM)) is a 10,000 member grassroots organization that attempts to effect change in New Jersey's use and administration of the death penalty through legislative, executive and legal action. NJADP urges this Court to reverse the ruling of the United States Court of Appeals for the Eleventh Circuit in favor of Respondents.

In particular, NJADP respectfully submits this brief in support of Petitioner Clarence Edward Hill, who brought this action under 42 U.S.C. § 1983, seeking declaratory and injunctive relief because Florida's lethal injection protocol results in an unreasonable risk of unnecessary pain and suffering, and, as such, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Amicus curiae* submits that States should be required to account for their lethal injection protocols and procedures and that such protocols and procedures should be based upon reasoned medical opinion and sound scientific evidence. Only through the adoption of reasoned protocols and procedures can States insure that the administration of lethal injection will not result in the significant likelihood of unnecessary pain and suffering.

SUMMARY OF THE ARGUMENT

The question before this Court is whether a challenge to a specific lethal injection protocol is cognizable under 42 U.S.C. § 1983. Are such claims "properly viewed as challenges to the conditions of a condemned inmate's death sentence," or do they fall "within the core of federal habeas

corpus?'" *See United States v. Nelson*, 541 U.S. 637, 643-44 (2004). Such challenges to a lethal injection protocol are cognizable under Section 1983 and do not fall within the core of federal habeas corpus.

First, a challenge to a specific lethal injection protocol is cognizable under Section 1983. The Eighth Amendment bars the unnecessary infliction of pain and suffering. Petitioner alleges that, as it is administered, there is a significant likelihood that Florida's lethal injection protocol will result in unnecessary pain and suffering. In order to avoid this significant likelihood, a State's lethal injection protocols and procedures must be based upon reasoned medical opinion and evidence. In most States, including Florida, such protocols and procedures are not based upon reasoned medical opinion and evidence. As such, most States fail to insure that lethal injection is properly administered, resulting in a significant likelihood of unnecessary pain and suffering. Hence, Petitioner presents a cognizable claim under Section 1983.

Second, a challenge to a specific lethal injection protocol does not imply the invalidity of the conviction or death sentence, and hence does not fall within the core of habeas corpus. Rather, such a claim challenges the conditions under which the inmate will be executed, not the fact of the execution itself. Because States are free to adopt reasonable, constitutional alternatives to the challenged protocol, a challenge to a lethal injection protocol, even if successful, will not imply the invalidity of the underlying conviction and sentence.

Thus, Petitioner Hill's claim regarding Florida's specific lethal injection protocols was appropriately brought under Section 1983. As such, this Court should reverse the ruling of the Eleventh Circuit Court of Appeals.

ARGUMENT

I. PETITIONER'S CLAIM DOES NOT SOUND IN HABEAS CORPUS, BUT RATHER STATES A COGNIZABLE CLAIM UNDER SECTION 1983.

A. A Challenge To A Particular Lethal Injection Protocol Is Cognizable Under Section 1983.

Section 1983 authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Petitioner's complaint states such a claim. He alleges that the State of Florida, under color of state law, will subject him to a deprivation of a right secured by the Constitution, namely the right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments. *See* U.S. Const. amends VIII and XIV.

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). Punishments are considered unnecessary or wanton when they are either "barbaric" or "excessive in relation to the crime committed." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). A punishment is excessive if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing other than the purposeless and needless imposition of pain and suffering." *Id.* at 592. Indeed, this Court has long held that the Eighth Amendment protects prisoners from the "gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183 (citing *Wilkerson v.*

Utah, 99 U.S. 130, 135-36 (1878) and *In re Kemmler*, 136 U.S. 436, 447 (1890)). Here, Petitioner claims that Florida's lethal injection protocol will result in the unnecessary and wanton infliction of pain. He alleges that there is a significant likelihood that the improper administration of anesthesia will result in a torturous death, which would constitute "the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592. Thus, Petitioner states a cognizable claim under Section 1983.

Florida, like a majority of States, employs a three-drug protocol for carrying out executions by lethal injection. *See Sims v. State*, 754 So. 2d 657, 666 n.17 (Fla. 2000). The protocol contemplates that a succession of three drugs will be administered intravenously to the death-sentenced prisoner. *See id.* at 687. The first drug -- administered in a nonlethal dose -- is an "ultra-short acting barbiturate," typically sodium thiopental, the function of which is to induce a loss of consciousness; the second is a neuro-muscular blocking agent, typically pancuronium bromide, which is a muscle relaxant and paralyzes the diaphragm and the lungs; and the third is potassium chloride, which induces cardiac arrest. *See id.*; Report of Mark Heath, M.D., dated February 13, 2004, at ¶¶ 7, 10, 14 (proposed to be lodged, pursuant to Rule 32.3, with the Clerk of the United States Supreme Court; also on file with counsel);[1] Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution And Lethal Injection And What It Says About Us*, 63 OHIO ST. L.J. 63, 97-98 (2002).[2]

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[1] This document was submitted as public comment in connection with the NJDOC's public hearing regarding proposed amendments to the Department's lethal injection regulations.

[2] Today, lethal injection is the exclusive method of execution in 27 states. In 9 others, there is a choice of methods, one of which is lethal injection.

Petitioner's challenge to the three-drug protocol alleges that there is a significant likelihood that the short-acting barbiturate will not be administered properly, in which case he will be insufficiently anesthetized. *See* Heath Report, at ¶ 5. Without appropriate anesthesia, an affected prisoner will suffer excruciating pain when the two other drugs that make up the protocol are administered. *See id.* The neuromuscular blocking agent, which has no anesthetic properties, will completely paralyze the inmate, but leave him conscious and awake as he suffocates. *See id.* at ¶ 10; Denno, *supra*, at 109 n. 321 (noting that if the short-acting barbiturate wears off, "'the prisoner will suffer an extremely painful sensation of crushing and suffocation, as the pancuronium bromide takes effect and stops his ability to breath'" (*quoting* Affidavit of Edward A. Brunner, M.D., Ph.D., Exhibit B of Verified Complaint in Chancery, Gacy v. Peters, No. 94 CH (Ill. Apr. 1994)); *see also Chaney v. Heckler*, 718 F.2d 1174, 1191 (D.C.Cir. 1983), *rev'd on other grounds*, 470 U.S. 821 (1985) ("Indeed, even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation."). And the potassium chloride will cause an "excruciating searing or burning sensation that is likened to that of boiling oil or branding with a hot iron." *See* Heath Report, at ¶ 15.[3] Thus, if the dosage of sodium thiopental is too low or if it is improperly administered, the inmate "will regain consciousness only to find himself paralyzed by the pancuronium and then experiencing the agony of intravenous concentrated potassium injection." *See* Heath Report, at ¶ 7.

See Denno, *supra*, at 90-94. Thus, there are 36 states that authorize the use lethal injection as a method of execution.

[3] Notably, "[t]here are many possible alternative drugs or chemical agents that are equally effective in causing and maintaining cardiac arrest but do not cause pain." Heath Report, at ¶ 18.

In light of the potential for excruciating pain in the administration of the three-drug protocol, States must insure that their protocols and procedures for administering lethal injection are adopted on the basis of medical expertise regarding the proper administration of anesthesia. Where such protocols are, to the contrary, based upon an utter lack of expert opinion and scientific evidence, they are arbitrary and cannot be justified in light of the proscription on cruel and unusual punishment. *See Overton v. Bazzetta*, 539 U.S. 126, 136-37 (2003). Thus, in 2001, the New Jersey Department of Corrections (NJDOC) proposed to readopt and amend the regulations setting forth New Jersey's lethal injection protocol. *See* 33 N.J.R. 2991(a) (Sept. 4, 2001). NJADP brought an action challenging these regulations on state and federal constitutional and administrative-law grounds, alleging, *inter alia*, that the regulations violated the proscription on cruel and unusual punishment and that they lacked an appropriate administrative record. *See In re Readoption With Amendments of Death Penalty Regulations*, 367 N.J. Super. 61 (App. Div. 2004), *cert. denied* 182 N.J. 149 (2004). In that action, the court held that several of New Jersey's lethal injection regulations lacked an adequate administrative record that would demonstrate that they were based upon "reasoned medical opinion." *In re Readoption*, 367 N.J. Super. at 69. The court stated that its concern was "that DOC itself does not have medical expertise, and nothing in the record suggests medical consultation and opinion." *See id.* at 69. Without such a record of medical consultation and opinion, the court found, NJDOC was unable to show that the regulations at issue comported with "contemporary standards of decency and morality," and hence were not violative of the proscription on cruel and unusual punishment. *See id.*[4] The court therefore remanded

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[4] In considering whether a punishment is "cruel and unusual," this Court considers society's "'evolving standards of decency that mark the

the matter to NJDOC for "further consideration" and the opportunity to articulate "a supporting basis for those determinations." *See id.* at 68. Without such a basis, the regulations could not be implemented without running afoul of the proscription on cruel and unusual punishment.

Such principles apply here as well. States must base their protocols on reasoned medical opinion in order to insure that lethal injection does not constitute cruel and unusual punishment through the arbitrary infliction of pain and suffering. Yet, Florida, and other States, have failed to base their lethal injection protocols on reasoned medical opinion and scientific evidence. The three-drug protocol, now widely in use in Florida and numerous other States, was not adopted on the basis of such "reasoned medical opinion." *Id.* at 69. In fact, the three-drug protocol was first adopted in Oklahoma in 1977, based upon the informal advice of one physician. *See* Don Colburn, *Oklahoma Was the First*, WASH. POST, Dec. 11, 1990, at 14. That advice was in the form of a short letter to a state senator by Dr. Stanley Deutsch, who was then the head of Oklahoma Medical School's Anesthesiology Department. *See* Denno, *supra*, at 95. Dr. Deutsch suggested that lethal injection be carried out through the administration of an "ultra shorting acting barbiturate" and a "neuromuscular blocking drug." *See id.* at 95 n.207 (reprinting Dr. Deutsch's letter). In response, Oklahoma statutorily adopted a protocol which accepted, nearly verbatim, the terminology in his letter. *Compare* Okla. Stat. Ann. tit. 22, § 1014(A) *with* Denno, *supra*, at 95-96 n. 207. Other States followed Oklahoma without further scientific inquiry. *See* Denno, *supra*, at 97-98; *see also* Stephen Trombley, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 70-75 (1992). It is unclear why potassium chloride was subsequently added

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progress of a mature society.'" *Atkins v. Georgia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

to the standard protocol, but there is reason to believe that it was at the suggestion of Fred Leuchter, who was neither a doctor nor a scientist, but an individual who invented execution devices which he sold to States around the country. *See* Trombley, *supra*, at 76-77. According to Leuchter, because there was no medical literature specifying the dosages of drugs that would be lethal, he relied on information that was available for pigs and estimated accordingly. *See id.* at 77-78. Leuchter later conceded that the information available was based upon a lethal injection that was carried out on only one pig. *See id.*

Moreover, Florida's lethal injection protocol and procedures do not even purport to be premised on such a reasoned basis, as they are created by Florida's Department of Corrections (FLDOC) without public scrutiny or formal rulemaking. In fact, Florida's lethal injection statute does not limit FLDOC's discretion in any way; nor does it require FLDOC to promulgate regulations implementing its lethal injection procedures. *See* Fla. Stat. § 922.105(5) (providing that a "death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution"). Thus, there are no substantive or procedural reins upon the FLDOC's discretion to adopt, modify, or deviate from any particular protocols or procedures. Indeed, Florida's lethal injection protocols are not even publicly available. And, they can be changed at any moment, up until the eve of execution.[5] Thus, FLDOC is not required to justify any of its lethal injection procedures in light of reasoned opinion.

It is evident that such protocols -- adopted without a basis in expert opinion and evidence -- are arbitrary and lack

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[5] In many states, protocols are not publicly available. *See* Denno, *supra*, at 116-17. In some states, the protocols are confidential or simply nonexistent. *See id.* at 117.

a reasonable medical basis. In specific, most State protocols entirely fail, in certain key respects, to insure the proper administration of lethal injection in light of the potential for excruciating pain in the absence of appropriate anesthesia.

First, lethal injection is most often carried out by individuals who have little or no expertise or training. *See* Herb Haines, *Primum Non Nocere: Chemical Execution and the Limits of Medical Social Control*, 36 SOC. PROBS. 442, 445-46 (1989); Harold L. Hirsh, *Physicians as Executioners*, LEGAL ASPECTS OF MED. PRAC. 1, 102 (Mar. 1984). In fact, most state protocols, including Florida's, do not specify who the executioners will be or what type of training they must have in order to administer lethal injection. *See* Denno, *supra*, at 121-22.

However, unless anesthesia is administered and monitored by individuals with adequate training, there can be no assurance that it will take effect and be adequately maintained. *See Morales v. Hickman*, -- F.Supp.2d. --, 2006 WL 335427, at *7 (N.D. Cal. Feb. 14, 2006), *aff'd*, __ F.3d __, 2006 WL 391604 (9th Cir. Feb. 19, 2006), *cert. denied*, No. 05-9291, __ S. Ct. __, 2006 WL 386765 (Feb. 20, 2006); Heath Report, at ¶¶ 18-23 (criticizing New Jersey's challenged protocol because it makes no attempt to provide for the assessment and verification of anesthetic depth to insure the loss of consciousness, or muscle response and response to noxious stimuli -- monitoring which is routinely required when similar drugs are administered to animals). Moreover, numerous aspects of the procedure require expertise. For example, there are several ways in which the intravenous administration of the drugs can fail, including through the incorrect insertion of the catheter into the tissues around the vein, the migration of the catheter, the perforation, rupture or leakage of the vein if too much pressure is administered, and the failure to properly loosen or remove a tourniquet or restraining straps that might impede

the absorption of the drugs. *See* Heath Report, at ¶ 9 (describing other common problems with the administration of intravenous drugs, including but not limited to a leaking IV and errors in labeling or in selecting the correct syringe). In addition, the condition of each prisoner's veins, relevant in terms of obtaining intravenous access, varies widely; indeed, such access can be extremely difficult to obtain, even for a medical professional, let alone an untrained executioner. *See On Lethal Injections and the Death Penalty*, 12 HASTINGS CENTER REP. 2, 2 (Oct. 1982) (explaining that lethal injections are particularly difficult to administer "to people with heavily pigmented skins . . . and to diabetics and drug users"); *Another U.S. Execution Amid Criticism Abroad*, N.Y. TIMES Apr. 24, 1992, at B7 (reporting that the difficulty in executing Billy Wayne White was due to his history as a heroin user); Thomas O. Finks, *Lethal Injection: An Uneasy Alliance of Law and Medicine*, 4 J. LEGAL MED. 383, 397 (1983) (explaining that "(a)s many as one in four prisoners may have veins that are hard to get at because they are deep, flat, covered by fat or damaged by drug use"); Suzanne McBride, *Problem With Vein Delays Execution*, INDIANAPOLIS NEWS, July 18, 1996, at 1 (describing a 1998 Indiana execution in which it took 49 minutes to find the veins, sticking needles into body).

Moreover, few States specify the dosages of the drugs to be administered, by statute, by regulation or even by written protocol. *See* Denno, *supra*, at 119 (noting that only nine States specify the quantities to be administered and that even in those States the protocol may only set forth a particular volume, which does not provide any information about the potency of the drug to be administered).[6] Without

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[6] Florida's protocol does not mention the "volume of fluid used to dissolve" the sodium pentothal. *See* Denno, *supra*, at 119. Thus, the concentrations of the three chemicals are not specified in the protocol, making it impossible to know if sodium pentothal is being effectively administered. *See id.*

doing so, it is impossible to ascertain whether or not the inmate undergoing lethal execution is properly anesthetized. Nor do States require, for example, that the dosages administered account for each prisoner's physical characteristics, assuring that the prisoner will remain anesthetized during the course of his execution. *See* Finks, *supra*, at 397 (noting that "(a)ge, sex, and body weight all contribute to the individual's response to the drug[s]" used in lethal injection); Denno, *supra*, at 117-19. Some prisoners may need a higher dosage of thiopental than others "before losing consciousness and sensation." *See* Denno, *supra*, at 353. Thus, the failure to specify the appropriate dosages, including taking into account the individual characteristics of the person to be executed, in addition to the lack of adequate training required of the executioners, results in the significant likelihood of improper administration of the death penalty and unnecessary pain and suffering.

In sum, lethal injection protocols and procedures which do not prescribe the appropriate dosages in order to insure proper anesthesia, and which fail to provide that lethal injection be carried out by adequately trained individuals, are not based upon reasoned medical opinion and scientific evidence and will result in a substantial likelihood of an inhumane and torturous death by lethal injection. Thus, such protocols do not accord with contemporary standards of morality and decency and instead constitute cruel and unusual punishment. Because the significant likelihood of an inhumane and tortuous death would constitute cruel and unusual punishment, Petitioner states a cognizable claim under Section 1983.

B. A Challenge To A Particular Lethal Injection Protocol Does Not Imply The Invalidity Of The Conviction Or Death Sentence.

However, even if Petitioner states a cognizable Section 1983 claim, this claim will yield to the more specific federal habeas corpus statute, *see* 28 U.S.C. § 2254, with its attendant procedural and exhaustion requirements, *see* 28 U.S.C. § 2244, if he seeks injunctive relief challenging the fact of his conviction or the duration of his sentence. *See Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). If a claim falls within the "core" of habeas corpus, that is, if it amounts to a challenge to the fact or duration of a sentence, it is not cognizable when brought pursuant to Section 1983. *See id.* The question is whether a judgment in favor the plaintiff "would necessarily imply the invalidity of his conviction or sentence." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994).

Petitioner Hill seeks a permanent injunction that will bar the state from executing him "in the manner they currently intend." Compl., at ¶¶ 19-20. He does not seek relief from judgment, execution or even death by lethal injection. Rather, his claim alleges that the administration of Florida's lethal injection protocol will result in a significant likelihood of unnecessary pain and suffering. Even if his claim is successful, the State is free to adopt constitutionally acceptable alternatives to the current protocol, alternatives that are based upon medical expertise and scientific evidence and which will not result in a significant likelihood of unnecessary pain and suffering. Thus, Petitioner's challenge is not equivalent to a challenge to the underlying conviction or sentence. *See Nelson*, 541 U.S. at 644 (noting that "simply by altering its method of execution," the State can go forward with the sentence).

Instead, a challenge to a lethal injection protocol is challenge to the way in which lethal injection is carried out.

Such a challenge contends that the failure to insure proper anesthesia through sufficient and individualized dosages of the ultra-short acting barbiturate and the failure to provide that adequately trained individuals carry out the execution results in a significant likelihood of pain and suffering. As such, a challenge to a lethal injection protocol is equivalent to a conditions of confinement claim. *See id.* (reasoning that a claim challenging an aspect of lethal injection, as opposed to lethal injection itself or execution more generally, is no different than a "'deliberate indifference' challenge to the constitutionality" of a particular procedure (*quoting Estelle v. Gamble*, 429 U.S. 97 (1976)). Petitioner does not challenge lethal injection as a method of execution or refuse to concede reasonable alternatives. *See id.* at 645 (noting that petitioner was not unable or unwilling to concede "acceptable alternatives" to the challenged procedure). Petitioner challenges certain specific aspects of lethal injection protocol and its administration. Thus, this claim does not sound in habeas corpus because success on the merits will not "necessarily imply that" the death sentence at issue is unlawful. *See Nelson*, 541 U.S. at 644.

CONCLUSION

For the foregoing reasons, the Court should reverse the ruling of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Physicians for Human Rights, Global Lawyers and Physicians, Lawrence D. Egbert, M.D., M.P.H., Jonathan Groner, M.D. and Andrew Gumbs, M.D. hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorney for petitioner has been obtained, as evidenced by the attached letter. The consent

of the attorney for respondent was requested, but not received prior to the deadline for filing this brief.

Amici, including the members of PHR and GLP, have extensive experience in medicine, particularly anesthesiology, as well as the use of IV tubing, catheters, and the administration and effects of the intravenous drugs used in lethal injection. As physicians and anesthesiologists, *amici* have a strong interest in the proper administration of intravenous drugs, and a unique familiarity with and understanding of the scientific issues involved. *Amici* write in the hope that their expertise may be of assistance to the Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 05-8794

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* PHYSICIANS FOR HUMAN RIGHTS, GLOBAL LAWYERS AND PHYSICIANS, LAWRENCE D. EGBERT, M.D., M.P.H., JONATHAN GRONER, M.D., AND ANDREW GUMBS, M.D. SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*

Physicians for Human Rights ("PHR") is a non-profit organization representing thousands of health professionals. Founded in 1986, the organization has sought to use medical and scientific methods to investigate, expose and end human rights violations around the world. The organization focuses particularly on the role of the medical community in advancing human rights. It has sought to assure that public

policies, including criminal justice policies, are consistent with knowledge of medicine and public health. In 1997, Physicians for Human Rights shared the Nobel Peace Prize as one of the original steering committee members of the International Campaign to Ban Landmines.

Global Lawyers and Physicians ("GLP"), founded in 1996, is a non-profit nongovernmental organization that focuses on health and human rights issues. GLP was formed to reinvigorate the collaboration of the legal and medical/public health professions to protect the human rights and dignity of all persons. GLP works at the local, national, and international levels on issues with a focus on health and human rights, patient rights, and human experimentation.

Dr. Lawrence Egbert, formerly professor of anesthesiology at University of Texas Southwestern Medical School, is now a professor of anesthesiology at The Johns Hopkins University. Dr. Egbert, the President of Physicians for Social Responsibility of Baltimore, has provided anesthesiology services on four Doctors Without Borders missions, in Sri Lanka, Lebanon, and Kosovo. He is a nationally recognized expert on the administration of lethal injection, and has testified in previous lethal injection cases

Dr. Jonathan Groner is a clinical associate professor of surgery at The Ohio State University College of Medicine and Public Health, the medical director of the Trauma Program at Columbus Children's Hospital, and a pediatric surgeon with a busy clinical practice. He also teaches medical students, residents, and allied health professionals about surgery, trauma and injury prevention. Since 1997, Dr. Groner has written numerous articles about lethal injection.

Dr. Andrew Gumbs attended college and medical school at Yale University. As a medical student, he received 2 research fellowships to perform work on Chagas Disease in

Brazil. He performed his general surgery residency at the Yale-New Haven Hospital where he was awarded the Resident Teaching award in his Chief year and was named the Best Surgical Resident. He performed a 2 year clinical and research fellowship in Pancreatic Surgery at the University of Verona in Italy under the auspices of the Italian Ministry of Health. He is currently a Minimal Access Surgery Fellow and Instructor in Surgery at New York-Presbyterian Hospital and has authored over 25 published manuscripts and one book chapter. He is a member of the Society of American Gastrointestinal Endoscopic Surgeons, the International Hepato Pancreato Biliary Association, and the Society of Laparoendoscopic Surgeons, and has spoken at multiple national and international meetings.

Amici, including the members of PHR and GLP, have extensive experience in medicine, particularly anesthesiology, as well as the use of IV tubing, catheters, and the administration and effects of the intravenous drugs used in lethal injection. As members of the anesthesiology community and the medical community in general, *amici* have a strong interest in the proper administration of intravenous drugs in patients, and a unique familiarity with and understanding of the scientific issues involved. *Amici* write in the hope that their expertise may be of assistance to the Court, particularly in understanding that an assessment of the likelihood of excruciating pain caused by lethal injection requires an intensive, individualized assessment of the protocol, equipment, knowledge, experience, and skills to be applied in each case.

SUMMARY OF ARGUMENT

Amici take no position regarding the procedural question in this case. And *amici* do not address the ultimate legal issue whether the execution of any condemned inmate by lethal injection violates the Cruel and Unusual Punishments Clause of the United States Consti-

tution. However, underlying the procedural issue raised in this matter are medical and technical issues about which *amici* care very deeply, to which *amici* have devoted substantial research, and with respect to which *amici* have significant expertise.

The combination of chemicals administered by the state of Florida to execute condemned inmates—*i.e.*, the sequential intravenous administration of sodium thiopental, pancuronium bromide and potassium chloride—is widely used by the United States jurisdictions that execute condemned inmates by lethal injection. If administered improperly, this combination of chemicals would cause an inmate to suffocate, while consciously experiencing the blinding pain of an injection of potassium chloride and a coronary arrest, while onlookers believe him to be unconscious and insensitive to any pain. Yet all across the country, state lethal injection protocols fail to provide execution personnel the adequate training, appropriate procedures, and proper equipment necessary to administer lethal injection. Instead, current state lethal injection protocols are so deficient in guidance that they create a significant and gratuitous likelihood that some inmates will unnecessarily suffer horrible pain.

STATEMENT

Petitioner Clarence Edward Hill was convicted of murder and sentenced to death by the Florida state courts. See *Hill* v. *State*, 643 So. 2d 1071 (Fla. 1994). He subsequently filed a complaint under 42 U.S.C. § 1983 alleging that in executing him by means of the sequential intravenous administration of sodium thiopental, pancuronium bromide and potassium chloride, the respondents, acting under color of Florida law, will cause, or create a foreseeable risk of causing, the unnecessary and wanton infliction of pain in bringing about his death. This Court granted *certiorari* in order to determine whether such a claim is properly

brought under 42 U.S.C. § 1983, or in a petition for a writ of habeas corpus.

Amici take no position in this action regarding the procedural question in this case. And *amici* do not address the ultimate legal issue whether the execution of any condemned inmate by lethal injection violates the Cruel and Unusual Punishments Clause of the United States Constitution. However, underlying the procedural issue raised in this matter are medical and technical issues about which *amici* care very deeply, to which *amici* have devoted substantial research, and with respect to which *amici* have significant expertise.

Thirty-eight states, along with the federal government and the United States military, authorize capital punishment, and all but one of these jurisdictions authorizes execution by lethal injection.[1] See Capital Punishment Statistics, U.S. Dep't. of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cp.htm (last visited Mar. 2, 2006). Well over 80% of all executions carried out in this country since 1976—including 98% of all executions since January 1, 2000—have been effected by lethal injection.

The combination of chemicals administered by the state of Florida to execute condemned inmates—*i.e.*, the sequential intravenous administration of sodium thiopental, pancuronium bromide and potassium chloride—is widely used by the United States jurisdictions that execute condemned inmates by lethal injection. See *Abdur'Rahman* v. *Bredesen*, 181 S.W.3d 292, 307 (Tenn. 2005) ("the undisputed evidence before the Chancellor was that only two states do not use some combination" of these chemicals in lethal injection). If improperly administered, this combination of chemicals will cause inhuman suffering on the part of the inmate prior

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[1] Nebraska requires execution by electrocution. See Neb. Rev. Stat. § 29-2543 (2005).

to his death. And the procedures by which lethal injection is administered in jurisdictions across the country create a significant and unnecessarily high likelihood that the three-drug procedure will be administered in a manner that causes such suffering on the part of at least some inmates prior to their death.

Both sodium thiopental and pancuronium bromide can cause respiratory arrest and be lethal, but the injection of potassium chloride shortly after the injection of sodium thiopental and pancuronium bromide normally ensures that death occurs by cardiac arrest before respiratory arrest occurs. Thus, in all lethal injection jurisdictions, potassium chloride is the agent intended to bring about the inmate's death. Sodium thiopental is administered as an anesthetic, and pancuronium bromide is administered for "cosmetic" or "aesthetic" reasons; *i.e.*, to make the prisoner appear serene.

In the doses and concentrations in which it is administered in the lethal injection process, potassium chloride is—absent adequate anesthesia—indescribably painful. It "scours the nerve fibers lining [the inmate's] veins," *Evans* v. *Saar*, No. L-06-149, 2006 WL 274476, at *1 (D. Md. Feb. 1, 2006) and interrupts the heart's signaling function, interfering with its rhythmic contractions and causing a massive coronary arrest. Administering this quantity of potassium chloride to a conscious individual would, in addition to precipitating a painful coronary arrest, result in an excruciating burning pain, extending from the site of the injection (normally an arm, hand, leg or foot) to the heart, and would constitute the most severe form of torture.

The administration of pancuronium bromide during the lethal injection process greatly increases the likelihood that the inmate will suffer agonizing pain. Although it makes the inmate incapable of any voluntary movement, and even of breathing, pancuronium bromide has no effect whatso-

ever on awareness, cognition or sensation.[2] As a result, an individual to whom pancuronium bromide has been administered, but who is not properly anesthetized, will endure the terror of conscious paralysis, with no ability to struggle or communicate to anyone else that he is conscious and feels pain. An inmate undergoing lethal injection to whom pancuronium bromide has been administered, and who is not properly anesthetized, would suffocate while experiencing (consciously) the blinding pain of an injection of potassium chloride and a massive heart attack, while onlookers believed him to be unconscious and insensitive to any pain.

Although an inmate who is properly anesthetized will not consciously experience the pain and terror associated with injections of pancuronium bromide and potassium chloride, their injection into the veins of an individual who is not sufficiently anesthetized would cause horrible suffering. Therefore, unless the inmate is brought to an appropriate anesthetic depth by the injection of sodium thiopental, and unless that depth is maintained throughout the lethal injection process, the inmate will endure savage torment.

However, achieving and maintaining an appropriate anesthetic depth is an extraordinarily complex endeavor, which requires specialized training, procedures and equipment. If adequately trained personnel, appropriate procedures and proper equipment are not employed throughout the lethal injection process, there is a significant likelihood that tremendous agony will be inflicted upon some inmates in the course of any significant number of executions. Although different lethal injection jurisdictions use different procedures, and many are loathe to disclose those procedures, see Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses*

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[2] Pancuronium bromide is used to prevent involuntary movement by certain surgical patients, who are anesthetized and whose breathing and ventilation are accomplished artificially.

Of Electrocution And Lethal Injection And What It Says About Us, 63 Ohio St. L.J. 63, 116-17 (2002), the lethal injection procedures in use in at least some jurisdictions, by failing to provide for appropriate training, procedures and equipment, make it inevitable that some inmates will suffer inhuman, and entirely unnecessary, pain.

ARGUMENT

Lethal Injection Procedures In Use In The United States Create A Significant Likelihood That Condemned Inmates Will Not Be Properly Anesthetized During The Lethal Injection Process.

Sodium thiopental is a barbiturate used by anesthesiologists to anesthetize patients temporarily, in order to permit sufficient time to intubate the trachea and institute mechanical support of ventilation and respiration. Once this has been achieved, additional drugs are administered to maintain a level of anesthesia deep enough to ensure that the patient feels no pain and is unconscious for the duration of a surgical procedure. The medical utility of sodium thiopental derives from its short-acting properties when administered in smaller doses: if unanticipated obstacles hinder or prevent successful intubation, patients will quickly regain consciousness and will resume ventilation and respiration on their own.

If the dose of sodium thiopental normally administered in lethal injection is, in fact, successfully delivered to the inmate's circulatory system, it is unlikely that the inmate will retain or regain consciousness. However, if that dose is not successfully delivered, the inmate may retain or regain consciousness prior to death, and experience the horrific pain of injections of pancuronium bromide and potassium chloride.

The intravenous administration of any anesthetic, including sodium thiopental, is a complex task, involving many steps and many opportunities for problems to thwart the

delivery of the intended dose. It requires substantial training and proficiency, but lethal injection jurisdictions in the United States often fail to specify the training and proficiency required of the personnel assigned to administer sodium thiopental, or assign the task to personnel with no training or expertise. In addition, the lethal injection procedures used in those jurisdictions create a further likelihood that a condemned inmate will not receive the necessary dose of sodium thiopental, and as a result, will not be properly anesthetized prior to receiving injections of pancuronium bromide and potassium chloride.

Execution logs and eyewitness accounts of executions suggest that the likelihood of failure inherent in lethal injection protocols is neither theoretical nor remote. For example, execution records in California reveal that, although sodium thiopental doses in that jurisdiction are calculated to render the inmate unconscious and to cease respiration, six inmates executed from 1999-2006 did not stop breathing until after or at the time of the pancuronium bromide injection. See *Morales v. Hickman*, No. 06-219 JF, 2006 WL 335427, at *5-6 (N.D. Cal. Feb. 14, 2006).

Although even ideal procedures cannot eliminate entirely the mis-administration of anesthesia, standard procedures have been developed over time in order to minimize those risks. By deviating from those standard procedures, often significantly and without justification, lethal injection protocols currently in use make it inevitable that, over any large number of executions, some inmates will suffer excruciating pain. Thus, the instances in which that occurs are not "unforeseeable accidents," but the predictable result of poorly-designed procedures implemented by unqualified personnel.

A. Preparation and Dosage

Sodium thiopental has a short shelf life in liquid form. It is distributed in powdered form to increase its shelf life, and must be mixed into a liquid solution before use. As a result, execution personnel must first prepare the sodium thiopental for intravenous delivery. This preparation requires the application of pharmaceutical knowledge and familiarity with applicable terminology and abbreviations. Without detailed and specific instructions stating exactly how to formulate the sodium thiopental, there is a needless increase in the likelihood that an inadequately trained executioner will mistakenly prepare the wrong dose.

Moreover, the effect of an intravenous injection of sodium thiopental depends upon the interplay of a complex set of factors, including, for example, the rate of administration of the drugs, the rate of delivery of any intervening flush solutions and the relative timing of the delivery of the drugs. Where sodium thiopental is not prepared and administered by qualified individuals, who are able to observe the inmate and determine the effectiveness of sodium thiopental, in order to ensure that it brings about a deep, lengthy anesthetized state, and that the inmate remains in that state throughout the execution, the inmate may lose consciousness for only a brief period, leaving him sensible to the horrific pain resulting from the administration of potassium chloride, but unable to communicate that pain to those administering the lethal injection because of the paralyzing effect of pancuronium bromide.

B. Administration

Sodium thiopental's principal use is in the induction of anesthesia. Once this has been achieved, additional drugs are administered to maintain a "surgical depth" or "surgical plane" of anesthesia (*i.e.*, a level of anesthesia deep enough to ensure that a surgical patient feels no pain and is

unconscious for the duration of the surgical procedure). The medical utility of sodium thiopental derives from its short-acting properties when administered in small doses: if unanticipated obstacles hinder or prevent successful intubation (securing the airway with a breathing tube), patients will quickly regain consciousness and will resume ventilation and respiration on their own.

However, these benefits of sodium thiopental in the operating room are not only unnecessary, but engender serious risks, in the execution chamber. Other anesthetics are available, the effects of which are far more prolonged than sodium thiopental, and their use would minimize or eliminate the risk that an anesthetized inmate would regain consciousness during the lethal injection process.

But if sodium thiopental is to be used in lethal injection, and if it is not administered in a large enough dose to ensure continued and sustained unconsciousness during the administration of pancuronium bromide and potassium chloride, it should be administered *continuously* to the inmate. See David Kravets, "California altering lethal injection protocol," Associated Press, Mar. 3, 2006 (reporting that California prison officials are changing lethal injection protocol to provide for continuous administration of anesthetic). However, the lethal injection protocols in use in at least some lethal injection jurisdictions fail to provide for the continuous intravenous administration of sodium thiopental. For example, while an Oklahoma statute requires that "[t]he punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultrashort-acting barbiturate," Okla. Stat. tit. 22, §1014 (2003), the Florida protocol states that only "[t]he first two syringes" will contain sodium thiopental. *Sims* v. *State*, 754 So. 2d 657, 665 n.17 (Fla. 2000). The failure to administer a continuous infusion of sodium thiopental may create a significant, but completely avoidable and therefore unnecessary, risk that the

condemned inmate will regain consciousness after receiving sodium thiopental, and consciously experience muscular paralysis, without loss of consciousness or sensation, during the excruciating pain of both suffocation and the intravenous injection of potassium chloride.

C. IV Equipment

Prior to execution, the condemned inmate is secured to a gurney or table with restraints to the ankles, wrists, and chest. If—as is often the case in lethal injection—the personnel administering the drugs are not at the recipient's "bedside," but are instead in a different room, see *Morales* v. *Hickman*, No. 06-219-JF, (N.D. Cal. Feb. 21, 2006) (order granting defendant's motion to proceed with execution under alternative procedures as condition to order denying preliminary injunction) (noting that "having a person in the execution chamber is contrary to departmental policy"); *Abdur'Rahman*, 181 S.W.3d at 301 ("[t]he executioner remains in a room adjacent to the death chamber"); Supplemental Report: Methods of Execution Used by States, Florida Corrections Commission,[3] (June 20, 1997), at 8-9, available at http://www.fcc.state.fl.us/fcc/reports/methods/emstates.html ("Florida Report") (finding that in Louisiana and Missouri, the executioner is in a room separate from the inmate), intravenous tubes lead from the inmate in the execution chamber, through a wall or under a curtain, and into an adjacent room, where personnel administer the execution. Multiple IV extension sets, and additional components and connections, may be required to reach from the prisoner to the adjacent room.

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[3] The Florida Corrections Commission was established by the Florida Legislature to provide oversight to Florida's correctional system and provide policy and budget recommendations to the Florida Governor and Legislature. See Florida Corrections Commission Welcome Page, http://www.fcc.state.fl.us/fcc (last visited Mar. 2, 2006).

An "IV setup" consists of multiple components—including not only the lines, but also stopcocks, injection ports, etc.—that are assembled by hand prior to use. Any of the connections between the IV components may loosen and leak. See Brian Witte, "Triple murderer in Maryland executed after Supreme Court rejects last-ditch appeals," Associated Press, June 18, 2004 (Maryland officials acknowledged that IV line used to deliver lethal injection to Tyrone Gilliam in 1998 leaked). And the use of additional IV tubing and components increases the likelihood of leaks and kinks. Therefore, in clinical practice, it is important to maintain visual surveillance of the entirety of the IV setup so that any leaks or kinks can be detected. The relative positions of the inmate and the personnel administering the lethal injection not only increase the likelihood of leaks, by requiring additional IV tubing and components, but may also preclude such surveillance, making it difficult or impossible to detect leaks. This problem may be exacerbated where a sheet or other covering is placed over any portion of the IV setup, including any portion physically attached to the inmate. See Sara Rimer, "In the Busiest Death Chamber, Duty Carries Its Own Burdens," N.Y. Times, Dec. 17, 2000 (describing Texas inmate about to be executed as strapped to gurney under a sheet).

In addition, an IV setup may include a "stopcock," which is a device used to provide access for the administration of solutions, and to regulate their directional flow to a patient's vascular system. A valve on the stopcock can be opened and closed to permit or restrict flow. Many stopcocks are designed in such a manner that it is not readily apparent whether a valve is open or closed, and the error of retrograde injection (in which a closed valve causes an injected solution to "back up" in the IV system, diluting the drug being injected and causing it to take a very long time to reach the vascular system) is well known in practice. A retrograde injection can also occur where an injection port

is used without a stopcock, because many individuals (and particularly those who lack appropriate training) are unaware that in that case, the IV tubing must be pinched or kinked upstream from the injection site.

Where a leak or retrograde injection occurs, the inmate may receive a dose of sodium thiopental insufficient to render him unconscious, or to prevent him from regaining consciousness, before the injection of pancuronium bromide and potassium chloride. However, the inmate may nevertheless still receive a dose of pancuronium bromide sufficient to paralyze him, and a dose of potassium chloride sufficient to cause unendurable pain.

D. Injection

Consistent with clinical practice, the chemicals administered during lethal injection are typically administered through catheters, small needles with hollow tubes inserted into the inmate's vein. If the catheter is not properly inserted in the inmate's vein, or if it moves after being inserted, sodium thiopental will not enter the vein, but will enter the tissue surrounding it, and will not be delivered to the inmate's central nervous system, and will not render him unconscious. This condition, known as infiltration, can also occur if the wall of the vein is perforated or weakened during insertion of the catheter, or if the chemicals are injected with excessive pressure.

Infiltration occurs with regularity in the clinical setting, and requires continuous surveillance of the IV site, preferably by the individual performing the injection, so as to permit correlation between visual observation and tactile feedback from the syringe plunger. Where, as may be the case in the lethal injection setting, the individual administering the injection is not located in close proximity to the inmate, or where the injection site is covered, infiltration will go undetected and uncorrected, in which case the inmate might not be sufficiently anesthetized by

the injection of sodium thiopental to ensure that he is not conscious when pancuronium bromide and potassium chloride are injected.

Moreover, absorption of the chemicals being administered can be hindered if catheters are inserted in the wrong direction—*i.e.*, directing flow *away* from the inmate's heart. See Denno, *supra*, 63 Ohio St. L.J. at 110. For example, the 1990 execution of Charles Walker in Illinois was prolonged when execution personnel inserted the intravenous needle pointing towards Walker's fingers, instead of his heart. "Niles Group Questions Execution Procedure," United Press International, Nov. 8, 1992.

E. Other Problems

Lethal injection procedures in use in various jurisdictions create a variety of other opportunities for the failure to achieve and maintain the necessary anesthetic depth. For example, lethal injection protocols may fail to specify the timing of the injections to be given the inmate, and since sodium thiopental is a short-acting barbiturate when administered in small doses, it may cease to be effective if there is too long a delay between its administration and that of pancuronium bromide or potassium chloride.

As currently devised, lethal injection protocols fail to address the essential step of assessing anesthetic depth following the administration of sodium thiopental. A physical or tactile examination is particularly important because, in order to ensure that the inmate will not experience the pain of the injection of pancuronium bromide and potassium chloride, he must be in a surgical plane of anesthesia characterized not merely by loss of consciousness, but by "loss of reflex muscle response and loss of response to noxious stimuli." See *2000 Report of the Panel on Euthanasia of the American Veterinary Medical Association*, 218 Journal of the American Veterinary Medical Association 669, at 681 (Mar. 1, 2001), available at

http://www.aphis.usda.gov/ac/euthanasia.pdf (discussing standards for euthanasia of animals). The danger that obvious signs that an appropriate level of anesthetic depth has not been achieved may be missed is particularly great where, as in most, if not all, lethal injection jurisdictions, the person administering the lethal chemicals is physically separate from the inmate.

F. Training and Qualification

The opportunities for failure to deliver an appropriate dose of anesthetic described above make manifest the need for particularized determinations of whether execution personnel possess adequate training and proficiency to administer lethal injections in order to prevent what otherwise would be unbearable suffering. The need for such assessments is especially acute in view of the fact that lethal injection protocols in use in the United States typically fail to specify the training and proficiency required of such personnel, see *Abdur'Rahman*, 181 S.W.3d at 301 (finding that the warden prepares the syringes, but with no finding as to the warden's ability or training to do so); Denno, *supra*, 63 Ohio St. L.J. at 121 (noting that protocols of only fourteen states mention "training," "competency," "preparation" or "practice," and that those that do fail to indicate what type of training is required); see also Administrative Directive, Procedure for Execution, Arkansas Department of Correction, May 23, 1996 ("Arkansas Protocol") (stating only that "orientation, if needed...will be...provided by the Director [of the Department of Correction]," but providing no standard for or description of training); Administrative Regulation 300-14, Colorado Department of Correction, June 15, 2004 ("Colorado Protocol") (requiring only that the executive director of the Department of Correction will "ensure" the staff is properly trained, but providing no standard for or description of training required); Florida Report, at 8, 10 (finding that "there are no written procedures" in

Louisiana, and that in Oklahoma, execution personnel "are not required to be medically trained") and lethal injection jurisdictions generally refuse to identify the personnel involved in performing the executions. See Arkansas Protocol; Colorado Protocol; see also Florida Report (finding executioner's identity is kept secret in Georgia, Oklahoma and Virginia).

As noted above, *amici* do not suggest that the participation of an anesthesiologist or other physician is necessary in lethal injections.[4] However, the individuals who administer lethal injections must have more adequate and appropriate training related to the drugs they will administer and to the assessment of anesthetic depth than called for under the protocols currently in use. The predictable result of the lack of such training will be that some inmates will be inadequately sedated, and will suffer horrible pain during the execution process.

Conclusion

As noted, *amici* take no position with respect to the question whether Petitioner Hill's claim is properly brought under 42 U.S.C. § 1983, or in a petition for a writ of habeas corpus. Nor do *amici* take any position herein on the questions whether any particular jurisdiction's lethal injection procedure is unreliable, or inflicts unnecessary pain, or whether lethal injection is inhumane and/or violative of the Eighth Amendment *per se*. As the above discussion demonstrates, however, the compounds used in the

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[4] In fact, *amici* note that physicians are prohibited from participating in legally authorized executions, including lethal injection. See American Medical Association policy E-2.06: Capital Punishment, http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/E-2.06.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/E-1.02.HTM&nxt_pol=policyfiles/ HnE/E-2.01.HTM (last visited Mar. 2, 2006).

lethal injection process create a significant and gratuitous likelihood that some inmates will unnecessarily suffer horrible pain. *Amici* respectfully suggest that the question whether the particular lethal injection procedure used in any jurisdiction causes that risk to rise to the level of a constitutional violation requires the development of an adequate factual record, and cannot properly be addressed without a thorough study of the procedure in question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner,

v.

JAMES R. MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Habeas Corpus Resource Center is an agency of the Judicial Branch of the State of California. HCRC provides legal representation for indigent petitioners in death penalty habeas corpus proceedings before the California Supreme Court and the federal courts, assists the California Supreme Court by identifying and recruiting private counsel qualified to accept appointments in death penalty habeas corpus proceedings, and provides training and serves as a resource to these attorneys. *See* Cal. Gov't Code § 68661 (West 2006). The HCRC is representing or has represented death row

prisoners in over fifty state and federal habeas corpus proceedings.

The HCRC has an interest in the resolution of this case both in its capacity as counsel to death row inmates and because of its larger responsibility for supporting private counsel. In the second of those roles, HCRC already has been involved in litigation challenging the constitutionality of the method used by the State of California to carry out executions.

The HCRC, therefore, has a particular interest in ensuring that the adjudication of claims relating to the constitutionality of particular methods of execution which may involve "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (lead plurality opinion), are made upon adequately developed, fully informed factual records. It respectfully submits this *Amicus Curiae* brief to explain the importance of permitting factual development of particularized challenges to methods of lethal injection, as illustrated by recent litigation in California, most notably in the case of *Morales v. Hickman*.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk.[1]

STATEMENT OF THE CASE

On January 20, 2006, Mr. Hill, a Florida death row prisoner facing execution by lethal injection, brought an action in federal district court, under 42 U.S.C. section 1983, challenging the State's lethal injection protocol as violative

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[1] Pursuant to this Court's Rule 37.6, we certify that no part of this brief was authored by counsel for any party and no person or entity other than the Habeas Corpus Resource Center made any monetary contribution to the preparation or submission of the brief.

of the Eighth and Fourteenth Amendments to the Constitution. Mr. Hill alleged, in summary, that the particular succession and amounts of three chemicals used in the Florida protocol "will cause unnecessary pain in the execution of . . . [his] sentence of death." Complaint, ¶18. Without permitting any factual development or examining the merits of the claims, the district court denied Mr. Hill's complaint for lack of jurisdiction, stating that it was the "functional equivalent" of a successive habeas petition under 28 U.S.C. section 2244 and that Mr. Hill should have first sought permission from the Eleventh Circuit to file such a petition. *Hill v. Crosby*, ___ F. Supp. ___, 2006 WL 167585 at *2 (N.D. Fla. Jan. 21, 2006).

On January 23, 2006, Mr. Hill appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. The circuit court affirmed, agreeing with the district court that Mr. Hill's section 1983 action was the "functional equivalent" of a successive habeas petition and holding that 28 U.S.C. section 2244 does not permit challenges to a lethal injection protocol to be brought in a successive habeas corpus petition. *Hill v. Crosby*, __ F.3rd ___, 2006 WL 163607 (11th Cir. Jan. 24, 2006).

On January 25, 2006, this Court granted Mr. Hill's petition for certiorari. *Hill v. Crosby*, ___ U.S. ___, 126 S. Ct. 1189 (2006). The petition presents the following two questions:

> 1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?
>
> 2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to

use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

SUMMARY OF ARGUMENT

Mr. Hill's case presents the question of whether the Eleventh Circuit correctly dismissed his complaint challenging Florida's protocol for lethal injection without permitting any factual development bearing on the merits of the claim he pleaded. *Amicus Curiae* urges this Court, particularly in addressing Question 2 of the questions presented for review, to allow Mr. Hill to develop his claim in a manner that accommodates the need for discovery and the making of an adequate factual record in order to support informed Eighth Amendment adjudication of a challenge to a particular lethal injection protocol.

In this regard, the California case of *Morales v. Hickman*, currently pending in the United States District Court for the Northern District of California, is instructive. There, the district court concluded that it properly had jurisdiction to review whether there was an unconstitutional likelihood that Mr. Morales would experience unnecessary and excruciating pain if executed under the California procedures.[2] The district court further determined that, because the State of California solely possessed information critical to resolving Mr. Morales' claim, limited discovery was warranted prior to

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[2] Although there are some differences between the lethal injection protocols of California and Florida, both utilize a mechanical apparatus (rather than a syringe) to inject three drugs to perform the execution. The three drugs are sodium thiopental, a sedative; pancuronium bromide, a neuromuscular blocking agent; and potassium chloride, which is used to induce cardiac arrest. The crux of Mr. Morales' challenge to the California procedure is that some component or the interaction of components of the protocol will result in his not being sufficiently anesthetized by the first chemical when the second and third chemicals are injected.

summary adjudication of the matter. Based on the information discovered, the district court concluded that Mr. Morales has demonstrated "substantial questions" that he would suffer excessive pain if executed under the existing procedures. With the State's input and modification of its execution protocol, the district court then fashioned a limited remedy that, if followed, would have permitted Mr. Morales' execution. The State ultimately was unable to implement its modified protocol or otherwise minimize the unconstitutional risk of an excruciating execution.

As the *Morales* case demonstrates, challenges to lethal injection protocols are extremely complex, fact-intensive litigations that require adequate factual development before a proper determination can be made as to whether a particular protocol passes constitutional muster. *Amicus Curiae* therefore urges this Court to allow Mr. Hill to pursue his challenge to Florida's lethal injection protocol in the lower federal courts so that he may develop a proper record regarding the specifics of the protocol comparable to the record that has been developed, and will be further developed, in *Morales*. *Amicus Curiae* suggests this course because the quality of the record is of paramount importance for informed adjudication of a constitutional question like the one presented in *Hill*. In testing lethal injection procedures against the cruel and unusual punishments guarantee of the Eighth Amendment, the federal courts "must review independently both the legal issues and those factual matters with which they are commingled." *Oyama v. California*, 332 U.S. 633, 636 (1948); *see also* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 608 (1991) ("fact and law in constitutional analysis are bound together").

ARGUMENT

I.

A FULL FACTUAL RECORD MUST BE DEVELOPED BEFORE A COURT MAY PROPERLY REVIEW A CONSTITUTIONAL CHALLENGE TO A STATE'S LETHAL INJECTION PROCEDURES.

The factual development resulting from the recent litigation in *Morales v. Hickman* provides a strong example of why this Court should afford Mr. Hill the opportunity to discover and present evidence challenging Florida's lethal injection procedures. Mr. Morales has developed a record showing that the use of California's existing execution protocol created an undue likelihood that he would suffer intense pain if executed by lethal injection. Mr. Morales' argument was twofold: First, due to the failure to properly sedate the prisoner,[3] there was a substantial probability that he would be conscious and experience excruciating and unnecessary pain when the remaining two drugs were administered.[4] Second, there were recurrent, serious problems with the personnel and apparatus used to administer lethal injections.[5] Although there are some differences between California's lethal injection procedure and Florida's protocol,[6] both states use the same three chemicals during executions and similar methods of delivering the chemicals.

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[3] *See* Part II, at pages 12-16, *infra*.

[4] As the Ninth Circuit noted: "There is no dispute that in the absence of a properly administered anesthetic, Morales would experience the sensation of suffocation as a result of the pancuronium bromide and excruciating pain from the potassium chloride activating nerve endings in Morales' veins." *Morales v. Hickman*, 2006 WL 391604 at *2.

[5] *See* Parts III and IV at pages 16–19, *infra*.

[6] *See Sims v. Florida*, 754 So.2d 657, 666 n.17 (Fla. 2000).

On January 13, 2006, Mr. Morales brought an action in the district court pursuant to 42 U.S.C. section 1983 seeking injunctive relief to prevent the State of California from executing him by means of lethal injection pending the resolution of his action. Mr. Morales alleged that the State's administration of Procedure No. 770,[7] the lethal injection protocol of California's Department of Corrections and Rehabilitation, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it created a substantial likelihood that he would be conscious and in agonizing pain for the duration of the execution process. Mr. Morales specifically alleged that the use of pancuronium bromide and potassium chloride in executing him would cause him to suffer excruciating pain because he would not be properly sedated. Mr. Morales also alleged that California's apparatus for delivering the chemicals was severely flawed and created the danger that a proper dosage of the sedative sodium thiopental would not be delivered.[8] In addition, Mr. Morales alleged that San Quentin's staff was not properly trained to insert intravenous tubes, which increases the risk of inadequate delivery of the sedative.

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[7] Although the State has not made clear how Procedure 770 was developed, it has conceded that no medical personnel were involved in its development and that there has been no medical approval of the procedure.

[8] California's Procedure 770 requires multiple sets of intravenous tubing and extensions because the chemicals are administered to the prisoner from a separate room located behind the gurney on which the prisoner is strapped. It is estimated that approximately fifty feet of intravenous tubing is used to deliver the toxic chemicals to the prisoner. These tubes are connected with various "diaphragms" or adapters. The risk of the chemicals not being properly delivered to the prisoner is greatly increased by the use of such lengthy amounts of tubing, because the tubing can crimp, preventing the chemicals from reaching the prisoner, and the multiple connections increase the risk of leakage.

On the same date, Mr. Morales also filed a motion for discovery, requesting numerous documents. The district court later granted a portion of his request and provided Mr. Morales with the execution logs and handwritten notes of the three most recent California executions,[9] an unredacted version of Procedure 770, and all existing electrocardiograms ("EKGs") of executed prisoners.

Mr. Morales filed a Motion for a Temporary Restraining Order on January 17, 2006, which the district court construed as a motion for a preliminary injunction. The district court held the first hearing on Mr. Morales' motion on January 26, 2006. The main focus of the hearing was to discuss the three most recent executions, as well as whether the use of pancuronium bromide was necessary in the execution protocol given that it would prevent any observer from detecting whether the prisoner was properly sedated. The court ordered additional briefing regarding the three most recent executions, with a timetable that, while expeditious, would allow Mr. Morales' expert to review the recently obtained execution logs and handwritten notes.

At the subsequent hearing, held on February 9, 2006, the district court noted that there were significant problems with the three most recent executions. It was specifically concerned that, in the cases of Stanley "Tookie" Williams and Clarence Ray Allen, the prisoners may not have been properly sedated.[10] The district court also noted that their

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[9] The three most recent executions that California had conducted were those of Donald Beardslee on January 19, 2005; Stanley "Tookie" Williams on December 13, 2005; and Clarence Ray Allen on January 17, 2006.

[10] The district court's findings at this hearing were premised upon the discovery afforded to Mr. Morales, three declarations from Dr. Mark Heath, a Professor of Clinical Anesthesiology at Columbia University Medical Center, and numerous eyewitness accounts of the previous executions. As described more fully

breathing persisted for much longer than the time the State's expert suggested would be expected.[11] In addition, the district court determined that the EKGs provided by the State and used to monitor the prisoners' breathing were scientifically invalid in that they did not indicate the rate of breathing or the time between breaths. The district court found a third declaration provided by Dr. Mark Heath, Mr. Morales's anesthesiology expert, particularly persuasive, and, as a result, requested additional supplemental briefing to address the feasibility of proceeding with Mr. Morales' execution either using only sodium thiopental or utilizing an independent means to ensure that he would be unconscious before pancuronium bromide and potassium chloride were injected.[12]

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below, the recent executions demonstrate that the State continued to experience difficulties administering executions after the same district court had rejected a challenge to lethal injection the previous year. In particular, the execution logs and handwritten notes taken by prison officials during the executions of Mr. Williams and Mr. Allen demonstrate a significant likelihood that both of these prisoners experienced excruciating pain during their executions.

[11] The State's expert opined that a properly sedated prisoner receiving five grams of sodium thiopental would stop breathing within one minute.

[12] The State responded to the district court's order by arguing that it would be "feasible" to execute Mr. Morales by using sodium thiopental alone, but that it might unnecessarily delay the execution as it could take up to forty-five minutes to produce death. The State argued that prior executions had taken 11.3 minutes, on average, to complete. As to the second option, the State responded that it would have the Warden stand in the chamber to assess whether the prisoner was unconscious, rejecting the court's suggestion that persons other than those employed by the Department of Corrections be present in the chamber with the prisoner.

On February 14, 2006, the district court issued an order addressing "the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed." *Morales v. Hickman*, ___F. Supp. 2d ___, 2006 WL 335427 at * 6 (N.D. Cal. Feb. 14, 2006). The court found that Mr. Morales had "raised substantial questions in this regard." *Id.* Specifically, it noted that

> evidence from Defendants' own execution logs that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California raises at least some doubt as to whether the protocol actually is functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia.

Id. at *6. The district court went on to hold that California's Procedure 770 had to be altered to ensure that Mr. Morales would not be conscious during his execution. It gave the State two options: either employ two anesthesiologists to monitor consciousness, or use only the prescribed five grams of sodium thiopental and eliminate the other two drugs from the execution. The district court, however, refused to stay Mr. Morales' execution date of February 21, 2006.

The State chose the option of having two anesthesiologists present during the execution. On February 16, 2006, the district court issued a compliance order detailing the procedure to be followed, most notably ordering that the anesthesiologists "take all medically necessary steps to ensure that [Mr. Morales] is and remains unconscious."

Mr. Morales appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment below. *Morales v. Hickman*, ___ F.3d ___, 2006 WL 391604 (9th Cir. Feb. 19, 2006). The court agreed with the district court that there were troubling questions raised by the record, but it concluded that the lower court's remedy would alleviate the risk of unnecessary pain.

As the execution date approached, however, the anesthesiologists retained by the State learned – apparently belatedly – what they would be expected to do during the procedure, and they refused to participate.[13] On the eve of the execution, the State changed course and decided that it would execute Mr. Morales by the use of sodium thiopental alone. The district court, at a hearing held on February 21, 2006, expressed concern and some skepticism as to how the State could have misinterpreted the court's prior order requiring the anesthesiologists to both monitor unconsciousness and "take all medically necessary steps" to ensure that Mr. Morales would remain unconscious during the administration of all three chemicals. As a result, the district court subsequently entered a very specific compliance order requiring that the personnel administering the sodium thiopental be licensed and properly trained, and directly inject the sedative into Mr. Morales instead of using the extended lengths of tubing called for in Procedure 770. The State declined to conduct the execution under these conditions, stating that it did not want to have any individual present in the execution chamber during the execution. As a result, the execution did not take place before the execution warrant expired. Subsequently, the district court ordered an evidentiary hearing to begin on May 2, 2006.

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[13] Stacy Finz, Bob Egelko, & Kevin Fagan, *Killer's execution rescheduled, delay comes before doctors walk out; new lethal injection set for 7:30 p.m.*, S.F. CHRON., Feb. 21, 2006, at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/21/MNG14HC1HG16.DTL&hw=finz&sn=004&sc=958

II.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT PREVIOUSLY EXECUTED PRISONERS WERE NOT PROPERLY SEDATED BEFORE THEIR EXECUTIONS.

Mr. Morales was enabled to present the district court with evidence that Procedure 770 created an undue likelihood of pain only through a careful development of the record, including limited but significant discovery ordered by the court and provided by the State. Execution logs kept by San Quentin State Prison for prior executions and obtained by Mr. Morales, partly through this court-ordered discovery, were particularly revealing in demonstrating problems with prior executions, and were heavily relied upon by the district court. They provided a basis for Mr. Morales' expert consultant, Dr. Mark Heath, an anesthesiologist familiar with lethal injection protocols throughout the country, to evaluate the actual operation of the California protocol and advise the court about it in a series of four progressively informed declarations.

Consequently, the district court concluded that, at a minimum, six of California's thirteen executions by lethal injection had significant problems related to the risk of improper anesthesia administration. Procedure 770 specifies the use of five grams of sodium thiopental for the stated purpose of anesthesia. Both the State and Mr. Morales agreed that this amount of sodium thiopental, if properly administered, would be sufficient not only to render the prisoner unconscious, but to stop his breathing within one minute and result in death within a few minutes. However, the record developed to date shows that prisoners executed under the protocol have not reacted to the sodium thiopental in this expected fashion.

For example, witness accounts of the execution of Stephen Wayne Anderson suggest that he was not properly

anesthetized when he died. The January 29, 2002 execution log for Mr. Anderson's execution, which the State recently produced to Mr. Morales in discovery, reveals that Mr. Anderson continued breathing until five minutes after the thiopental was administered. This persistent respiratory activity is not consistent with the expected effect of five grams of thiopental, which should stop all visible respiratory activity within a minute of its delivery. In addition, the execution took over thirty minutes, and during that time Mr. Anderson's chest and stomach heaved more than thirty times. Irregular heaving of the chest is not consistent with the depression of the central nervous system caused by sodium pentothal.[14] Rather, chest heaving is indicative of labored respiratory activity, which in turn strongly suggests that Mr. Anderson was conscious, and indeed may have been laboring against the paralyzing effect of the pancuronium bromide.

The execution log of Manuel Babbit's 1999 execution also indicates that he was not fully sedated during the process. A minute after the pancuronium bromide was administered, Mr. Babbit had shallow respirations and brief spasms in his upper abdomen, which is evidence that he was reacting to the effects of the pancuronium bromide. In addition, Mr. Babbit's heart rate remained constant until the potassium chloride was administered; whereas, if the full dose of sodium pentothal had been properly administered and distributed, Mr. Babbit's heart rate would have changed significantly. His distress was evident to witnesses of the execution, one of whom stated that about three or four minutes after Mr. Babbit closed his eyes and took a couple of deep breaths, he had a sudden and extreme convulsion which lasted a few seconds. This witness opined that Mr. Babbit appeared about to break all the restraints when this occurred.

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[14] According to Dr. Heath, the typical reaction to sodium pentothal is yawning, drawing one or two deep breaths, or visibly exhaling so that the cheeks puff out.

Furthermore, a review of Mr. Babbit's execution log shows that he maintained a steady heart rate of between 95 and 96 beats per minute a full seven minutes after the sodium thiopental was administered. If the full five-gram dose of sodium thiopental was properly administered, there would have been significant hemodynamic consequences, including a change of heart rate, during this time period. The log also indicates that Mr. Babbit had spasmodic movements of the upper chest after the pancuronium bromide was administered, similar to what was noted during the Stephen Anderson execution – again raising the concern that Mr. Babbit did not receive the full five grams of sodium thiopental and thus was conscious during the administration of the pancuronium bromide.

The execution logs of William Bonin's 1996 execution also reflect irregularities that may have caused him to die in excruciating pain. Mr. Bonin was given a second dose of pancuronium bromide for reasons that remain unclear, even though the initial dose would paralyze a person for several hours. The redundant dose raises questions about whether Bonin received the initial doses of sodium pentothal and pancuronium bromide; whether the injection team believed that he was still conscious; and, more broadly, whether such an irregularity is indicative of the lack of training or judgment of injection personnel. These accounts of earlier California executions, according to the Ninth Circuit, were "extremely troubling," because they indicate "that there were problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions." *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005).

Evidence developed in the *Morales* litigation relating to more recent executions buttresses this conclusion. The handwritten records of Stanley "Tookie" Williams' execution suggest that the entire dose of sodium thiopental may not have reached Mr. Williams, though none of this information

was recorded in his execution log. The State was not able to explain why the execution log did not contain the information present in the handwritten notes which were taken during the execution. The notes indicate that Mr. Williams did not stop breathing until 12:34 a.m., upon the injection of the potassium chloride, twelve minutes after the thiopental was injected. Thus, the thiopental did not have the effect on Mr. Williams' brain and respiratory activity that would be expected, with a high degree of medical certainty, from the delivery into the circulatory system of the full five-gram dose of thiopental.

The execution log of Clarence Ray Allen states that he continued breathing for nine minutes after the delivery of the thiopental. All evidence demonstrates that five grams of thiopental, if successfully delivered into the circulatory system, would ablate cerebral electrical and respiratory activity.

The March 15, 2000 execution log of Darrell Keith Rich states that Mr. Rich's respirations ceased at 12:08 a.m., with the administration of the pancuronium, but that Mr. Rich had "chest movements" lasting from 12:09 to 12:10 a.m.. These chest movements, beginning after Mr. Rich had ostensibly stopped breathing (and while he was still alive, as shown by his heart rate of 110 beats per minute), and three minutes after the administration of the thiopental, are again inconsistent with proper administration of the thiopental. The chest movements are consistent, however, with an attempt to fight against the accruing paralytic effect of the pancuronium. According to Dr. Heath, if the five-gram dose of thiopental had reached Mr. Rich and had the expected effect, he would not have been able to fight against the pancuronium by attempting to breathe, nor would he even have been aware of the effect of the pancuronium. Indeed, because the sodium thiopental dose, successfully delivered, would have arrested all cerebral activity, including all respiratory drive, there should have been no effort on Mr.

Rich's part to attempt to breathe during the onset of the pancuronium.

III.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT PERSONNEL AT SAN QUENTIN ARE NOT PROPERLY TRAINED TO INSERT INTRAVENOUS LINES.

There has also been a demonstrated problem of incorrect intravenous placement in at least three California executions. Most recently, during the execution of Stanley "Tookie" Williams, the injection team took twelve minutes to insert the intravenous lines. The first line was placed quickly but spurted blood, and the staff struggled for eleven minutes to insert the second line, having so much difficulty that Williams asked whether they were "doing that right." Kevin Fagan, *The Execution Of Stanley Tookie Williams Eyewitness: Prisoner Did Not Die Meekly, Quietly*, S.F. CHRON., Dec. 14, 2005, at A12. The difficulty of the challenge presented to the intravenous team is evidenced by the comment that "[b]y 12:10 a.m., the medical tech's lips were tight and white and sweat was pooling on her forehead as she probed Williams' arm." *Id.* Moreover, the execution log of Williams' execution shows that one of the intravenous lines failed.

Similarly, the execution log of Donald Beardslee's execution indicates that the second intravenous line was inserted with "difficulty," and the time entries indicate that it took twelve minutes to insert the second line, which is consistent with encountering problems in inserting the line. When it proceeds smoothly, placement of a peripheral intravenous should, in Dr. Heath's experience, take on the order of two minutes or less. In the execution of William Bonin, it took the staff assigned anywhere between eighteen and twenty-seven minutes to fashion the intravenous lines.

This is an unusually long period of time for an experienced and properly trained professional.

In the execution of Stephen Anderson on January 29, 2002, one of the persons who attempted to secure an intravenous was unable to do so without causing significant bleeding and the need to remove his gloves. This experience indicates that the process is a difficult one and that it is necessary that those doing it are properly trained and experienced.

IV.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT THE EXECUTION TEAM DEVIATED FROM PROTOCOL BY ADMINISTERING MULTIPLE DOSES OF CHEMICALS AND THAT THESE IRREGULARITIES WERE NOT REPORTED IN EXECUTION RECORDS.

The administration of a second dose of pancuronium (the neuromuscular blocking agent), as indicated in the log of Mr. Bonin's execution on February 23, 1996, was a source of concern to the district court hearing Mr. Morales' case. The court also was concerned when it learned that a second dose of potassium chloride (which burns through the veins to the heart, where it produces intense muscle cramping and eventually cardiac arrest), was administered to three prisoners, including Clarence Ray Allen.[15]

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[15] A declaration provided by Dr. Jack St. Clair of San Quentin State Prison indicates that a second dose of potassium chloride was injected into Mr. Allen, resulting in a flat line and pronouncement of death. The execution logs provided to Mr. Morales in discovery, however, made no mention of a second dose of potassium chloride in Mr. Allen's case or in any other execution. (The district court noted that execution logs had been altered by the State without any indication as to who made the alteration. *Morales v. Hickman*, ___ F. Supp. 2d ___, 2006 WL 335427 at *5

These irregularities led the district court to observe that

> evidence in the present record raises additional concerns as to the manner in which the drugs used in the lethal-injection protocol are administered. For example, it is unclear why some inmates—including Clarence Ray Allen, who had a long history of coronary artery disease and suffered a heart attack less than five months before he was executed, . . . — have required second doses of potassium chloride to stop promptly the beating of their hearts.

Morales v. Hickman, ___F. Supp. 2d ___, 2006 WL 335427 at *6 (N.D. Cal. Feb. 14, 2006).

CONCLUSION

The record developed in the *Morales* case was sufficient to enable the district court to determine that California's execution protocol was riddled with problems that threatened to produce needless, agonizing pain unless the protocol was significantly modified. Mr. Morales could not have developed such a record without court-ordered discovery and hearings through which he was able to obtain and present reliable evidence about the actual functioning of the California protocol. That evidence revealed, among other

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n.12.) Immediately following the Allen execution, on January 17, 2006, Steven Ornoski, Acting Warden of San Quentin State Prison, stated that the injection team was forced to administer a second dose of potassium chloride to Mr. Allen. Warden Ornoski also revealed at this time that the injection team had used a second dose of potassium chloride in two previous executions. *See* Kevin Fagan, *Reporter's Eyewitness Account of Allen's Execution*, S.F. CHRON., Jan. 17, 2006, at http:// www.sfgate.com/cgi-bin/article.cgi?f=c/a/2006/01/17/MNG37GOHD715.DTL&hw=fagan&sn=003&sc=679.

things, a wide chasm between the painless way in which the protocol was theoretically expected to operate and the torturous way it operated in fact.

The Eighth Amendment issues raised by Mr. Hill's section 1983 complaint cannot and should not be addressed without an adequate factual record. Mr. Hill should be permitted to make such a record.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner,

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE DARICK DEMORRIS WALKER SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

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STATEMENT OF INTEREST[1]

Amicus Darick Demorris Walker is a death-sentenced inmate in Virginia who is uniquely positioned to provide the Court with information regarding the importance of the availability of 42 U.S.C. § 1983 to challenge the method by which states administer lethal injection as a form of execution. He has filed such a challenge in Virginia and in the course of pursuing his lawsuit, he has obtained substantial discovery regarding Virginia's lethal injection procedure, which is similar in key respects to the procedure used by all other states that employ lethal injection, including Florida. The information learned by Amicus regarding Virginia is not readily available to the public and would not otherwise be known by the Court without the submission of an amicus brief of this kind. Amicus, therefore, submits this amicus brief to inform the Court about serious problems with state lethal injection protocols and the need for Section 1983 to enable death-sentenced inmates to redress such problems.

SUMMARY OF ARGUMENT

Virginia, like other states, has chosen a lethal injection procedure that raises grave constitutional concerns. Amicus has learned via discovery that Virginia entrusts the administration of its three-drug chemical combination to prison employees who lack any training in administering anesthesia. The executioners—led by a high school graduate with no medical training whatsoever—have no idea how to determine whether an inmate has achieved a sufficiently deep level of sedation that he is adequately shielded from the agonizing pain caused by the lethal chemicals. Even if the executioners had been taught how to monitor the level of sedation, their training would be useless because they are physically separated from the inmate by a curtain during the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than counsel to Amicus made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

entire procedure. And the inmate cannot express consciousness or pain because he has been administered, for cosmetic reasons, a paralyzing drug that neither aids his anesthesia nor hastens his death.

The state's protocol itself reveals either a lack of concern about the infliction of extreme pain or ignorance of how each chemical operates. For example, if the prisoner remains alive ten minutes after the drugs are applied, the protocol directs the executioner to readminister the painful killing drugs—but *not* the anesthesia. If the inmate is still alive after ten minutes, however, it is probably because the executioners failed to properly administer the drugs—and that the anesthesia either wore off or never took hold. Yet Virginia will not apply additional anesthesia.

Virginia adheres to its unsound method of conducting lethal injection despite evidence of problems in other states that use similar methods and despite the ready availability of alternative methods. Virginia could readily use different, less painful drugs, or it could employ personnel who are trained in ensuring that the person is properly anesthetized and therefore does not experience pain. Without meaningful explanation, the state rejects both options.

Absent a cause of action under Section 1983, Amicus would not have been able to expose the astonishing inadequacies inherent in the design and implementation of Virginia's protocol. The state has fought tenaciously to shield its procedures from public disclosure and judicial review. Only Amicus's lawsuit has forced Virginia to disclose its procedures—over the Commonwealth's vehement and repeated objections before both the district judge and the magistrate judge. Even after disclosing its procedures in discovery, Virginia unsuccessfully tried to prevent Amicus from presenting information about those procedures to this Court. This penchant for secrecy underscores the need for courts to adjudicate Section 1983 challenges to specific lethal injection protocols in order to ensure that lethal injection is in fact carried out in a constitutional manner.

ARGUMENT

I. SECTION 1983 IS A VITAL TOOL TO ENSURE THAT LETHAL INJECTION IS CONDUCTED IN A CONSTITUTIONAL MANNER

Amicus has filed his suit to challenge serious yet wholly avoidable problems with Virginia's lethal injection protocol. His suit questions not *whether* he may be executed, nor even *when*, but rather *how*. The tight veil of secrecy in which Virginia and other states cloak their execution procedures prevents death-sentenced inmates from learning the details about how the state intends to kill them. In pursuing his Section 1983 claim, Amicus has learned new and disturbing facts about Virginia's lethal injection procedure, which he discusses in depth below. *See infra* pp. 8-15. Amicus accordingly believes that Section 1983 is critical to ensuring that if he is to be executed, his execution does not unnecessarily and unconstitutionally risk causing him excruciating pain.

Amicus's execution is unscheduled. He currently has pending two separate habeas petitions: a petition on remand from this Court for reconsideration in light of *Banks* v. *Dretke*, 540 U.S. 668 (2004),[2] and an authorized successive petition raising a claim of mental retardation in which the Fourth Circuit has ordered an evidentiary hearing.[3]

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[2] *See Walker* v. *True*, 126 S. Ct. 1028 (2006).

[3] *See Walker* v. *True*, 399 F.3d 315 (4th Cir. 2005). Amicus is aware of pending lawsuits in at least four other states—Maryland, North Carolina, Oklahoma, and Texas—that are being pursued while collateral attacks remain outstanding. In Oklahoma, two inmates whose federal habeas petitions are still pending have filed § 1983 suits. *See Anderson* v. *Jones*, No. CIV-05-825-F (W.D. Okla. July 20, 2005) (§ 1983 suit filed by two inmates); *Anderson* v. *Mullin*, No. 04-6397 (10th Cir. May 31, 2005) (habeas petition); *Taylor* v. *Gibson*, No. 6:01-CV-00252-JHP-KEW (E.D. Okla. Nov. 29, 2001) (same). In Maryland, an inmate is pursuing a § 1983 claim while his state collateral attack remains pending. *See Evans* v. *Saar*, No. 1:06-cv-00149-BEL (D. Md.) (§ 1983 suit); *Evans* v. *State*, No. 107, 2006 WL 269980 (Md. Feb. 6, 2006) (state collateral attack remains pending). The same is true for inmates in Texas and North Carolina. *See Raby* v. *Livingston*, No. H-05-765 (S.D. Tex. Nov. 16, 2005) (denying motion to dismiss § 1983 claim and discussing procedural posture); *Page* v. *Beck*, No. 5:04-ct-00004-BO (E.D.N.C. Aug. 5, 2004) (same).

In light of this Court's decision in *Nelson* v. *Campbell*, 541 U.S. 637 (2004), and in light of his concerns about the grave yet wholly unnecessary risk of severe pain imposed by Virginia's lethal injection protocol, Amicus filed a Section 1983 complaint in the Eastern District of Virginia on August 10, 2005. The district court denied Virginia's motion to dismiss and held that Amicus stated a claim under Section 1983.[4] The district court subsequently denied Virginia's motion to exclude from the challenge all consideration of the selection, training and qualifications of personnel involved in administering lethal injection.[5]

Following the denial of Virginia's motion to dismiss, Amicus has conducted extensive discovery and has learned a considerable amount about the grave inadequacies of Virginia's lethal injection process. The facts that Amicus has learned, and the unnecessary threat of severe pain that Virginia gratuitously imposes upon the persons that it executes, are a testament to the necessity of Section 1983 as a vehicle to investigate and prosecute such claims.

Without Section 1983, information about the method of lethal injection employed by states and the unnecessary risk of pain that results from these methods would be difficult, if not impossible, to come by. Virginia—like many other states—is extraordinarily secretive about its execution protocols. Not until 2004 did Virginia even disclose the drugs that it uses to execute inmates. Even that disclosure was not accompanied by any disclosure of the training or qualifications of the personnel administering lethal injection.

In Amicus's pending lawsuit, the Commonwealth has fought relentlessly to avoid disclosing anything about its procedures; only by repeated and persistent motions practice before the district court has Amicus succeeded in extracting information. Even after losing its motion to dismiss Amicus's Section 1983 suit, Virginia continued to wage a

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[4] *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Oct. 28, 2005).

[5] *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006).

two-front war aimed at shielding its execution procedures from the light of day. Before the district judge, Virginia filed three subsequent motions attempting to dismiss, postpone, or limit Amicus's lethal injection challenge. All were denied.[6]

Before the magistrate judge, Virginia argued repeatedly that its security concerns exempted it from the normal discovery obligations of a civil litigant. Virginia adamantly refused to disclose its execution manual until forced to do so by the court—and even then, Virginia insisted that counsel to Amicus sign a strict confidentiality agreement pursuant to a protective order. Similarly, Virginia adamantly resisted Amicus's attempts to depose its current executioners until the district court intervened and ordered Virginia to do so. Virginia even failed to produce any relevant documents other than its execution manual until Amicus filed a motion to compel. And finally, the Commonwealth fought Amicus's attempt to amend the protective order to present this brief to the Court, forcing Amicus to seek and receive specific permission from the magistrate judge.

Only through such discovery—over the Commonwealth's heated objections—has Amicus been able to learn the details of Virginia's lethal injection process and the magnitude of risk inherent therein.[7]

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[6] *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Oct. 28, 2005) (denying motion to dismiss); *Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Dec. 20, 2005) (denying motion for reconsideration of order denying motion to dismiss lethal injection claim; denying motion for certification as an interlocutory appeal); *Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006) (denying motion to exclude all consideration of selection, qualifications, and training of personnel administering the lethal injection). The motion for reconsideration was granted insofar as it related to Virginia's alternative option of electrocution.

[7] Because of Virginia's continuing attempts to keep its method of execution secret, Amicus is currently subject to a broad protective order issued by the magistrate judge at Virginia's request. *See* Protective Order, *Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Dec. 9, 2005) (Jones, Mag. J.); Hearing on Motions Oral Argument Tr., Dec. 9, 2005, at 40 ("Every-

II. VIRGINIA'S PROTOCOL, WHICH GREATLY RESEMBLES THE PROTOCOLS USED BY ALL STATES THAT PERFORM EXECUTIONS BY LETHAL INJECTION, IS SEVERELY DEFICIENT AND EXPOSES THE INMATE TO SERIOUS, UNNECESSARY, AND UNCONSTITUTIONAL HARM

A. Virginia's Lethal Injection Protocol Raises Grave Concern That Condemned Inmates Will Suffer Excruciating Pain

On execution day in Virginia, the Commonwealth places the inmate in the hands of prison employees who lack the appropriate training to conduct the potentially painful procedure that Virginia uses to conduct executions by lethal injection. Rather than adopt one of the many possible ways of performing lethal injection without risk of severe pain—or employ trained professionals who would virtually eliminate that risk—Virginia, like every state that conducts executions by lethal injection, does so using a method that cavalierly risks excruciating pain. Even Virginia's own expert witness concedes that the protocol is constructed in this way for cosmetic reasons, to make the prisoner appear serene.[8] Yet this appearance of serenity may actually mask unbearable pain.

The protocol for lethal injection used by Virginia and by other states raises serious Eighth Amendment concerns. These concerns arise from the complexity of the mechanism

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thing else that we have been talking about is counsel's eyes only until otherwise allowed."). Amicus has obtained specific permission (over the state's vigorous objections) to amend the protective order to discuss certain enumerated topics in this brief. *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006) (Jones, Mag. J.). Accordingly, Amicus confines himself to discussion of those topics, and cannot reveal all that he knows about Virginia's execution protocol and how it has been implemented.

[8] Expert Report of Dr. Mark Dershwitz in *Walker* v. *Johnson*, at 4 (Jan. 23, 2006). All expert reports, depositions, interrogatory responses and letters cited in this brief are available from counsel to Amicus upon request by this Court. All such documents will be provided in redacted form to conform to the protective order that has been issued by the magistrate judge at Virginia's behest. *See supra* n.7.

for administering the drugs, the use of personnel with inadequate training to monitor the procedure, and the use of chemicals that, without adequate safeguards, can cause extreme pain. These concerns deserve full review by federal courts.

1. Virginia's Lethal Injection Protocol Requires Prison Employees Without Adequate Training to Administer Dangerous Drugs Via a Dangerous Procedure

a. *Virginia has chosen a three-drug combination that may inflict extreme and unnecessary agony*

Virginia—like Florida, and like every other state that conducts lethal injection—uses a three-drug chemical combination that consists of an anesthetic, a muscle paralyzer, and a painful drug that kills by stopping the heart. In Virginia, the drugs are sodium thiopental, pancuronium bromide, and potassium chloride, respectively.

Sodium thiopental is an ultra-short-acting anesthetic that is customarily used in surgery to induce anesthesia for a brief period of time. The drug is packaged in powdered form and must be properly mixed with water in the right concentration in order to have the intended effect. If sodium thiopental is not properly delivered into the inmate's bloodstream, then he may never become adequately anesthetized. Alternatively, even if the inmate is initially anesthetized, his anesthesia may wear off prior to, or during, the application of the subsequent drugs—the last of which is, as discussed below, extraordinarily painful.

Pancuronium bromide is a neuromuscular blocking agent that acts by paralyzing the muscles—yet has no effect on awareness, cognition, or sensation. It is used in surgery by trained anesthesiologists when it is imperative that the patient not move during the surgery—such as, for example, during delicate eye surgery, in which the slightest movement could prove catastrophic. When pancuronium bromide is injected in the quantity mandated by Virginia's protocol, an inmate is unable to make any voluntary movements—

much less talk or cry out in pain. If he is conscious and in excruciating agony, he will have no way of expressing it. He will be trapped in a chemical tomb.[9]

Potassium chloride is an electrolyte that when administered rapidly and in a high dose causes cardiac arrest. Injection of concentrated potassium activates sensory nerve fibers, causing severe pain as the drug travels through the venous system. There is universal medical agreement that, without adequate anesthesia, an injection of a potassium chloride overdose causes excruciating pain prior to causing cardiac arrest.[10]

b. *Virginia's choice of execution protocol and executioners needlessly increases the danger that the inmate will suffer unbearable pain*

If an inmate is properly anesthetized for the entire lethal injection process, then—by definition—he will feel no pain, except for the trivial amount of pain associated with the initial insertion of the needle. But Virginia, for reasons of its own choosing, has failed to take steps that would ensure that an inmate is properly anesthetized. The Commonwealth enlists executioners who lack training in assessing anesthesia and deploys them in a way that makes it particularly difficult to ascertain whether an inmate is properly anesthetized.

Virginia assigns execution responsibilities to prison employees who have other jobs and who work on the execution team as a sideline without receiving extra compensation.[11]

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[9] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 6 (Jan. 23, 2006).

[10] *See id.* at 5-6. Even Virginia's only expert witness agrees with Amicus on this point. *See* Expert Report of Dr. Mark Dershwitz in *Walker* v. *Johnson*, at 5 (Jan. 23, 2006).

[11] Named Witness 1 Dep. Tr. 130-131. The magistrate judge has ordered that Amicus not provide any information that identifies any personnel of the Virginia Department of Corrections. *See Walker* v. *Johnson*, No. 05-0934 (E.D. Va. Feb. 8, 2006) (Jones, Mag. J.), at 2. Accordingly,

On execution day, those employees bring the inmate into the execution chamber, place him on a table, and strap him in.[12] Prison employees insert intravenous lines into his arms and connect the inmate to a cardiac monitor.[13] To enable the lines to reach the injection sites, the protocol provides for the use of extension sets—multiple lengths of connected tubing.[14] Usually, lines are inserted in each arm, and the execution team leader decides into which arm he will push the drugs.[15] Before the drugs are actually administered, the executioners retreat behind a curtain.[16] The only member of the lethal injection team who can view the inmate is the team leader.[17] Even he is limited to viewing through a porthole in the curtain—and the protocol does not even require him to monitor the inmate at all.[18] The current execution team leader in Virginia has no educational training beyond a high school degree and has absolutely no medical training.[19] It is his sole responsibility to check to see whether the drugs—including the anesthesia—are actually flowing properly into the prisoner.[20]

Separated from the inmate by a curtain, the team leader injects the drugs into a tube in the intravenous line, beginning with 2 grams of sodium thiopental, followed by 50 milligrams of pancuronium bromide, followed by 240 milliequiva-

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plaintiff refers to the deponent cited in this footnote as "Named Witness 1." The other "Secret Witness" depositions cited in subsequent footnotes involved executioners who, at Virginia's insistence, Amicus deposed anonymously.

[12] Secret Witness 2 Dep. Tr. 29.

[13] Secret Witness 3 Dep. Tr. 38.

[14] *Id.* at 63-64.

[15] *Id.* at 47.

[16] *Id.* at 39.

[17] Secret Witness 2 Dep. Tr. 33.

[18] *Id.*

[19] Secret Witness 2 Dep. Tr. 9.

[20] *Id.* at 31-32.

lents of potassium chloride.[21] Following the administration of sodium thiopental, the current team leader has observed snoring—a poor gauge of anesthetic depth, *see infra* p. 12—but otherwise neither he nor anyone on the execution team checks in any way to make sure that the inmate is properly anesthetized.[22] Indeed, even if they did check, they would not know what to look for—no one on the team has any training in, or experience at, administering anesthesia.[23]

The protocol provides that after the administration of the potassium chloride, the doctor who attends the execution pursuant to Virginia statute observes the heart monitor and pronounces death at the appropriate moment.[24] *This is the only role played during the execution process by a medical doctor.* The doctor is stationed behind a curtain where he cannot see the inmate.[25]

The protocol provides that if death does not occur within ten minutes after the potassium chloride is administered, then a second set of pancuronium bromide and potassium chloride are administered.[26] The protocol does *not* provide for additional administration of the anesthetic, sodium thiopental.[27] Execution records disclosed to Amicus during discovery reveal that on several occasions, prison employees administered an additional dose of potassium chloride.[28] Yet on all such occasions, the executioners violated the protocol in two ways: by not waiting ten minutes, and by not adminis-

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[21] *Id.* at 14, 33.

[22] *Id.* at 37; Secret Witness 3 Dep. Tr. 39.

[23] Defendants' Second Supplemental Response to Plaintiff's Amended Second Set of Interrogatories 7-8; Letter from Banci E. Tewolde to Lara A. Englund, Feb. 28, 2006, at 2; Secret Witness 2 Dep. Tr. 55.

[24] Va. Code §§ 53.1-234, 53.1-235; Secret Witness 2 Dep. Tr. 46.

[25] Secret Witness 2 Dep. Tr. 46.

[26] Secret Witness 4 Dep. Tr. 109.

[27] Named Witness 1 Dep. Tr. 122-123.

[28] Secret Witness 4 Dep. Tr. 110.

tering additional pancuronium bromide.[29] The prison employees were consistent, however, about not administering additional anesthesia.[30]

2. Numerous Aspects of Virginia's Lethal Injection Protocol Raise Serious Concerns About Whether Virginia Is Taking Adequate Steps To Ensure That Inmates Do Not Suffer Excruciating Pain

Amicus's Section 1983 suit does not allege that lethal injection itself is unconstitutional, but he does allege that the way that Virginia is administering lethal injection violates the Constitution. The facts that Amicus has learned via discovery only confirm his view.

First, as discussed above, the use of pancuronium bromide prevents inmates from expressing themselves if they are in fact in great pain because the anesthetic either was not properly applied or subsequently wore off.

Second, the anesthetic is applied by persons who lack relevant training. Administering anesthesia is a difficult task requiring specific training in assessing a person's state of consciousness and ability to perceive pain. Yet the persons involved in administering anesthesia in Virginia executions lack *any* such training, much less adequate training. In particular, the only person who can see the inmate during the administration of the drugs—the team leader—has no training in assessing anesthetic depth; indeed he has no formal education beyond a high school degree.

Third, even if the team leader did have training in anesthesia, he would be unable to accurately gauge whether the inmate is sufficiently anesthetized. Anesthetic depth is usually determined by talking to a patient and watching as consciousness is lost and the patient no longer responds to ver-

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[29] *Id.* at 110-111.

[30] Virginia's execution records, which document for each prisoner the time that each drug was administered (or readministered), demonstrate that additional anesthesia was never applied.

bal commands, touching, and the application of what would otherwise (if the patient were unanesthetized) be painful stimuli. These steps can be performed only if the tester is within literal arm's reach of the patient.[31] Because the team leader and other executioners are distanced from the inmate and separated from him by a curtain, they cannot conduct the necessary tests to determine whether he is properly anesthetized.

Fourth, although the Virginia execution team is not checking to determine whether the inmate is properly anesthetized, they appear to believe that such checking is not necessary because, at least in some cases, they can hear the patient snoring. Yet the use of snoring as a proxy for an adequate depth of anesthesia is medically unacceptable. A person who is snoring is only lightly anesthetized at best and may still be able to experience pain. Furthermore, a lightly anesthetized person can subsequently wake up after the administration of pancuronium bromide—yet be unable to express himself, or move at all, due to the paralysis caused by that drug.[32]

Fifth, Virginia's protocol provides that if the inmate is not dead within ten minutes of the three drugs, then the prison employees will readminister pancuronium bromide and potassium chloride—but that they will *not* administer any additional anesthetic.[33] This further increases the probability that the inmate's original dose of anesthesia, if not

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[31] *See* Expert Report of Dr. Stuart M. Lowson in *Walker* v. *Johnson*, at 5-6 (Jan. 23, 2006).

[32] *See* Expert Report of Dr. Mark J.C. Heath in *Walker* v. *Johnson*, at 12-13 (Jan. 23, 2006).

[33] The protocol further provides that if, after the re-application of pancuronium bromide and potassium chloride, the inmate is still alive after another ten minutes have elapsed, then pancuronium bromide and potassium chloride shall be applied once again—and so forth at ten-minute intervals until the inmate is finally dead. At *no* point does the protocol allow for the readministration of additional anesthetic. Named Witness 1 Dep. Tr. 122-123.

properly administered, may wear off before, or during, the painful administration of potassium chloride. This is particularly worrisome because a delay of ten minutes following the administration of potassium chloride would raise serious questions about whether the executioners had failed to correctly administer the drugs—thereby increasing the chance that the inmate is not properly anesthetized and making the administration of an additional dose of anesthetic all the more necessary.[34] Indeed, the very fact that Virginia's protocol contemplates the possibility that the inmate may still be alive ten minutes after the administration of potassium chloride indicates that Virginia prison officials are aware that the administered drugs will not always reach the inmate as expected and yet they are unwilling to take steps to ensure that the inmate remains properly anesthetized.

Sixth, despite the clear guidelines of Virginia's protocol, the executioners have repeatedly deviated from it. Rather than waiting ten minutes after the application of the first set of the three drugs, and then applying pancuronium bromide and potassium chloride, prison employees on several occasions have waited one to three minutes and then applied only potassium chloride. This inexplicable deviation from protocol raises questions as to the ability of Virginia's executioners to follow the directions they are given, and raises further questions about whether they are able to apply the dangerous drugs with which they are entrusted without exposing inmates to excruciating pain.

Seventh, Virginia's protocol fails to provide adequate guidelines for the real possibility that the prison employees may be unable to obtain peripheral intravenous access, *i.e.*, via an arm or a leg, and thus will need to inject chemicals into a central vein, usually the femoral vein, located in the groin. Central veins, in contrast to peripheral veins, are located deep under skin and tissues and are adjacent to critical

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[34] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 13 (Jan. 23, 2006).

structures. Inserting a catheter into such a vein is a difficult procedure that must be performed by an individual with adequate proficiency and training. Conducting such a procedure in the absence of such training risks severe and painful complications, such as severe blood loss, collection of air between the lung and inner chest wall leading to death by suffocation, perforation of the bladder, and multiple other painful complications.[35] Given that in 2004, Virginia did in fact need to resort to a central vein in order to execute an inmate,[36] the lack of discussion in Virginia's protocol of how to perform the central line creates unacceptable risks.

Eighth, Virginia does not keep adequate records that might allow prison officials to determine whether any problems exist with its protocol. Amicus does not suggest that Virginia is especially deficient compared to other states in this regard—he merely notes that in states that *do* keep such records, such as California, the records have revealed the possible existence of serious problems. For example, in California, logs kept by prison officials suggest that inmates continue to breathe beyond a point that might be expected if the sodium thiopental had been correctly applied. *See infra* p. 15.

In sum, Virginia uses inadequately trained prison employees to administer a complex and dangerous procedure. To perform this procedure correctly, the prison employees must, among other things, mix the anesthetic solution to the designated concentration, check tubes, connectors, and valves to ensure that the drugs are not leaking, monitor the catheter to ensure that it is securely sited within the vein, and adequately flush the intravenous lines with saline solution to avoid the chemicals from mixing, precipitating, and

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[35] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 6-7 (Jan. 23, 2006).

[36] Secret Witness 4 Dep. Tr. 69-70.

failing to reach the inmate at the proper time and in the proper dosages.[37]

For these reasons, a person who is administering anesthesia cannot merely take on faith that the command to deliver anesthesia has automatically transported the recipient into a condition where he can feel no pain. This is especially true in situations where—as here—the procedure calls for the administration of a paralytic agent such as pancuronium bromide. If the inmate tries to express that he is still awake or in pain after the administration of the pancuronium bromide, it will be too late.

If Virginia wishes to use these unnecessarily risky procedures, then it must take steps to ensure that the inmate is free from excruciating pain. But as discussed above, Virginia does not even bother to monitor the anesthetization process while it is taking place to determine whether or not any problems are occurring. Yet data from other states that use protocols very similar to Virginia suggest that—as might be expected when using untrained personnel to administer dangerous drugs—problems do indeed occur.

In California, for instance, which uses the same three drugs as Virginia and Florida (and which uses two-and-a-half times as much anesthetic as Virginia), a federal district court recently found that anomalies in past executions were so severe that it barred California from conducting an upcoming execution as scheduled unless it either changed its drugs or employed personnel with adequate training in anesthesia. *See Morales* v. *Hickman*, Nos. C 06-219 JF & C 06-926 JF RS, 2006 WL 335427, at *5-8 (N.D. Cal. Feb. 14, 2006). In particular, the court cited evidence from the state's execution logs that indicated that breathing did not stop as expected within one minute of administration of sodium thiopental, but rather lasted much longer. *See id.* at *5-6; Brief of Amicus Curiae Habeas Corpus Resource Cen-

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[37] *See* Expert Report of Dr. Mark J.S. Heath in *Walker* v. *Johnson*, at 8-10 (Jan. 23, 2006).

ter 12-16. Other states that use the same three-drug combination have experienced significant problems—including leaking intravenous lines, solidifying chemicals that stop flowing, catheters inserted so that the needle points in the wrong direction, difficulties locating veins, and injections that cause veins to collapse.[38] These problems suggest strongly that the untrained personnel who perform lethal injection are not capable of doing so in a way that assures that an inmate is properly anesthetized.

B. Virginia Can Execute Inmates By Lethal Injection In A Way That Does Not Raise Constitutional Concerns

The litany of problems discussed above is not an unavoidable consequence of conducting executions by lethal injection. Rather, these problems are the specific result of deliberate choices made by Virginia (and other states) that

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[38] *See, e.g.*, *Oken* v. *Sizer*, 321 F. Supp. 2d 658, 667 n.7 (D. Md. 2004) (describing an improperly constructed intravenous line leading to fluids leaking and dripping onto the floor); Tim O'Neil, *Too-Tight Strap Hampered Execution*, St. Louis Post-Dispatch, May 5, 1995, at B1; *Witness to a Botched Execution*, St. Louis Post-Dispatch, May 8, 1995, at 6B (describing excessively tight leather straps improperly slowing the flow of the chemicals to the inmate); Michael Overall & Michael Smith, *22-Year-Old Killer Gets Early Execution*, Tulsa World, May 8, 1997, at A1 (describing the execution of Scott Dawn Carpenter, in which the inmate uttered a "guttural sound" and "gasp[ed] for air"); Michael Grazyk, *Convicted Killer Gets Lethal Injection*, Herald (Denison, Tex.), May 8, 1992 (describing inmate's reaction to the drugs as "violent," including "groan[s]," "gasp[s]," and a "coughing spasm"); *1st Try Fails to Execute Texas Death Row Inmate*, Orlando Sent., Apr. 23, 1998, at A16 (describing an execution delayed due to a collapsed vein); Rob Karwath & Susan Kuczka, *Gacy Execution Delay Blamed on Clogged IV Tube*, Chicago Trib., May 11, 1994, at 1 (Metro Lake Section) (describing an Illinois execution in which the chemicals unexpectedly solidified, clogging the intravenous tube that led into the inmate's arm, and prohibiting any further passage); Rhonda Cook, *Gang Leader Executed By Injection Death Comes 25 Years After Boy, 11, Slain*, Atlanta J. Const., Nov. 7, 2001, at B1 (explaining that after trying unsuccessfully for 15 to 20 minutes to locate a vein, technicians had to abandon their effort to insert needles into High's arm; instead, they inserted one in his hand and one between his shoulder and his neck).

are dictated neither by statute nor by the use of lethal injection itself. Simply put, Virginia (and other states) could either (1) use drugs that do not present the risk that an inmate will be paralyzed and in great pain, or (2) employ personnel who are trained in ensuring that a person is properly anesthetized and therefore does not experience pain.

Virginia does not contend that it is necessary to paralyze an inmate in order to kill him. In his expert report, Virginia's only expert witness cited solely cosmetic reasons for using a paralytic agent—the perceived need, in his view, to sanitize the execution process so as to prevent the involuntary contractions that might accompany death.[39]

If, for some reason, Virginia insists on maintaining its use of this unnecessary and dangerous paralytic drug, then it could avoid problems simply by ensuring that the inmate is monitored by a person with training and experience in assessing whether a person has reached, and remains at, a level of anesthesia that prevents him from experiencing pain.[40] No such safeguards have been implemented by Virginia.

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[39] Expert Report of Dr. Mark Dershwitz in *Walker* v. *Johnson*, at 4 (Jan. 23, 2006).

[40] The *Morales* court held that California could execute Morales as scheduled, using the same drugs as Virginia, if during the execution Morales was monitored by a person with formal training and experience in the field of general anesthesia. *See Morales*, 2006 WL 335427, at *8.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Case No. 05-8794

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE HILL, *Petitioner*,

v.

JAMES McDONOUGH, Interim Secretary,
Florida Department of Corrections, *Respondent*,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

I. Whether a complaint brought under 42 U.S.C. §1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. §2254.

II. Whether, under this Court's decision in *Nelson v. Campbell*, 541 U.S. 637 (2004), a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. §1983.

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Case No. 05-8794

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE HILL, *Petitioner*,

v.

JAMES McDONOUGH, Interim Secretary,
Florida Department of Corrections, *Respondent*.

OPINIONS BELOW

The district court decision in *Hill* was captioned as *Hill v. Crosby*, Case No. 4:06-cv-032-SPM (N.D. Fla. Jan. 21, 2006). It is reproduced at J.A. 11. The panel decision from the Eleventh Circuit Court of Appeals was reported as *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006). It is reproduced at J.A. 9.

JURISDICTIONAL STATEMENT

The Eleventh Circuit entered the final judgment below on January 24, 2006. Petitioners filed the petition seeking certiorari on January 24, 2006, and the Court granted certiorari on January 25, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED; CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves two sets of federal statutes. The first is 42 U.S.C. §1983, which states in relevant part

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ..

The other relevant statutes are the federal habeas corpus laws, 28 U.S.C. §§ 2241 through 2254.

STATEMENT OF THE CASE

A. Introduction

The questions presented concern the unanswered query in *Nelson v. Campbell*, 541 U.S. 637 (2004), whether §1983 can be used to challenge the method of execution regularly used by the state or whether such challenges must be brought in habeas. At issue is what federal forum is appropriate and available for a state prisoner who challenges the general method for carrying out a lethal injection execution.

The Eleventh Circuit properly found that Hill's suit for declaratory and "permanent injunctive relief barring execution" under 42 U.S.C. §1983, arguing "that death by lethal injection causes pain and unnecessary suffering and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments, is the 'functional equivalent' of a successive habeas petition." Such suits brought as §1983 complaints are governed by federal habeas corpus jurisprudence because, no matter how it is styled, the end result is that whenever a state prisoner attacks the usual means or method of execution, he is directly or indirectly challenging the enforcement of an otherwise valid death sentence. Nothing in any of the Court's governing jurisprudence holds to the contrary.

Clarence Hill contends that "the particular lethal injection procedures Florida intends to use to execute him violate the Eighth Amendment because those procedures create a foreseeable probability that he will be subjected to excruciating pain before death." Pet. Br. 17. Following denial in state judicial proceedings of his constitutional challenge to be free of cruel and unusual punishment under the Eighth Amendment, Hill proceeded to

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Hill v. Crosby, 437 F. 3d 1084 (11th Cir. 2006).

federal court via a last-minute §1983 complaint "modeled on the one this Court approved in *Nelson v. Campbell*, 541 U.S. 637 (2004)." Pet. Br. 2. In adjudicating Hill's eleventh hour filing, the Eleventh Circuit Court, in *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006), held that because his case was a habeas-equivalent, the district court's finding, that it was without jurisdiction pursuant to 28 U.S.C. §2244(b), was proper and affirmed. Relying on *Nelson*, Hill presently submits that his §1983 challenge "falls squarely within the ambit of *Nelson*." Pet. Br. 3. *Nelson* itself strongly suggests otherwise.

Alternatively, for the first time, Hill now characterizes his suit either as an "original habeas petition" or an exception to habeas procedures and argues that the Eleventh Circuit erred in deeming his claim the "functional equivalent" or a "second or successive" petition. Arguing a lack of redress, Hill's contention is that his "claim was not ripe for presentation or judicial consideration" because the current execution method was not adopted until 2000 "after the denial of Hill's federal habeas was final," and therefore based on favorable language found in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), he is also entitled to federal habeas corpus consideration. Pet. Br. 34. He is in error.

B. Factual Background

Hill was convicted of the first degree murder of Officer Stephen Taylor and sentenced to death in 1983. On October 19, 1982, Clarence Hill and his accomplice, Cliff Jackson, stole a pistol and an automobile in Mobile, Alabama, which they later used to rob a savings and loan association in Pensacola. During the robbery, the police arrived, and Hill and Jackson fled the savings and loan building from different exits. The police immediately apprehended Jackson, who had exited through the front door. Hill, who had fled out the back door, approached two officers from behind as they attempted to handcuff Jackson. Hill

shot the officers, killing one and wounding the other. Hill was convicted of first-degree murder, attempted first-degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony.

In 1985, the Florida Supreme Court affirmed the murder conviction but vacated the death sentence. *Hill v. State*, 477 So.2d 553 (Fla. 1985). Hill again received a death sentence at his 1986 resentencing. The Florida Supreme Court affirmed that sentence. *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1988). An initial death warrant was signed in November 1989, and Hill commenced collateral litigation in the state courts and then moved to federal court. The state courts denied all relief, but in January 1990, the federal district court entertaining Hill's federal petition granted a stay of execution, based on a plethora of issues, none of which challenged the method of execution. Finally, in 1992, the district court granted in part federal habeas relief, finding the state trial court and the Florida Supreme Court failed to conduct a proper harmless error inquiry when reweighing the aggravating factors supporting the death sentence after one of the factors was invalidated. The district court remanded the case to the state appellate court where the Florida Supreme Court reopened the appeal, reweighed the aggravating and mitigating factors, and affirmed Hill's death sentence. *Hill v. State*, 643 So.2d 1071 (Fla. 1995). Hill again sought federal habeas corpus relief in the district court from the reimposed death sentence. The district court denied relief and the Eleventh Circuit subsequently affirmed. *Hill v. Moore*, 175 F.3d 915 (11th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000).

During this time period, the Florida Legislature changed Florida's method of execution, making lethal injection the presumptive method of execution.[2]

Immediately following enactment of the statute, a number of Florida capital inmates contested the validity of this change to lethal injection on a variety of grounds including specific complaints about "the drugs to be used" and "the potential problems resulting from their use." The Florida Supreme Court, in *Sims v. State*, 754 So.2d 657 (Fla. 2000), rejected a full-scale assault on Florida's lethal injection method, based on detailed findings that the protocols and procedures authorizing lethal injections were proper. *Sims v. State*, *Id.*, 665 n.17 (Fla. 2000).[3]

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[2] §922.105(1) Fla. Stat. reads in material part

(1) A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution

§922.105(2), Fla. Stat. further provides that persons similarly situated to Hill, shall have 30 days from the effect of the act "to make an election" as to method-if no election is made then the method shall be by lethal injection.

[3] The state record discussed in *Sims*, 754 So.2d at 666, notes that Sims obtained a copy of the "Execution Day Procedures" created by the Florida Department of Corrections (DOC) on January 28, 2000, including the drugs used and how they would be delivered. The *Sims* record showed DOC disclosed to Sims on February 7, 2000, what chemicals were to be used during an execution. The testimony at Sims' evidentiary hearing revealed that after being placed on a heart monitor, "[T]he inmate will then be injected with two IV's containing saline solution. He will then be escorted into the execution chamber where the witnesses will be able to view the execution." ". A pharmacist will prepare the lethal substances. In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty

No subsequent decision has declared otherwise. And Hill has not provided any.

Although the Florida Supreme Court's decision in *Sims* provided Hill the wherewithal to attack the method and means in which Florida's execution process is carried out, Hill took no advantage of either the state or federal courts to address his

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milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating. Each syringe will be numbered to ensure that they are injected into the IV tube in the proper order. A physician will stand behind the executioner while the chemicals are being injected. The physician's assistance (sic) will also observe the execution and will certify the inmate's death upon completion of the execution." Evidence was also presented that "these procedures were created with the purpose of 'accomplishing our mission with humane dignity [while] carrying out the court's sentence.'"

The Florida Supreme Court further found that:

> On the issue of dosage, a defense expert admitted that only one milligram per kilogram of body weight is necessary to induce unconsciousness, and that a barbiturate coma is induced at five milligrams per kilogram of body weight. Thus, two grams of sodium pentothal (i.e., 2000 milligrams) is a lethal dose and certain to cause rapid loss of consciousness (i.e., within 30 seconds of injection). The expert further stated that muscle paralysis occurs at .1 milligram of pancuronium bromide per kilogram of body weight. Thus, fifty milligrams of pancuronium bromide far exceeds the amount necessary to achieve complete muscle paralysis. Finally, the expert admitted that 150 to 250 milliequivalents of potassium chloride would cause the heart to stop if injected quickly into the inmate and that an IV push would qualify as "quickly."

concerns[4] prior to his December 2005. Clearly his claim became ripe during the 2000-2005 period prior to the November 29, 2005 death warrant.[5]

Hill now assumes that "Florida's procedure is similar to procedures that two district courts have recently found to raise serious questions under the Eighth Amendment. *See Morales v. Hickman*, __ F. Supp. 2d __, 2006 WL 335427, at *7 (N.D. Cal. Feb. 14, 2006) (finding that administration of same three-chemical sequence raises 'substantial questions' that the condemned would be subjected to 'an undue risk of extreme pain'), *aff'd*, 438 F.3d 926 (9th Cir. Feb. 19, 2006), *cert. denied*, No. 05-9291, __ S. Ct. __, 2006 WL 386765 (Feb. 20, 2006); *Anderson v. Evans*, No. Civ-05-0825-F, 2006 WL 83093, at *4 (W.D. Okla. Jan. 11, 2006) (accepting in its entirety a Magistrate Judge's report holding that death sentenced inmates stated a valid claim that Oklahoma's administration of same three-chemical sequence for lethal injection creates an excessive risk of substantial injury' and pain under the Eighth Amendment)." Pet. Br. 8. Based on the aforenoted, he argues in his brief on the merits, that these cases are compelling. These cases were not decided at the time Hill sought §1983 review in federal court.[6]

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[4] Under Florida Rule 3.851(e)(2)(C), Fla.R.Crim.P., a capital defendant may file a successive postconviction motion "if based upon newly discovered evidence ..." Newly discovered evidence is evidence that was not known at the time of trial by the court, the party, or counsel, and "it must appear that the defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991) (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)), and the nature of the evidence must be such that on retrial it would probably produce an acquittal (either guilt or sentence). *Id.* at 915. *Robinson v. State*, 865 So.2d 1259, 1263 (Fla. 2004). In *Sims*, Sims filed a third 3.850 motion arguing that newly discovered evidence establishes his innocence. He also challenged the retroactive application of the recent legislative change to execution by lethal injection and the constitutionality of lethal injection.

Additionally, in *Hill v. State*, 904 So.2d 430 (Fla. 2005), the Florida Supreme Court summarily denied Hill's 2003 "second" postconviction motion which raised a *Ring v. Arizona* 536 U.S. 584 (2002), claim. Hill certainly had the opportunity in that litigation to raise his challenge to Florida's method of execution. He did not.

And nothing barred Hill from raising a state civil rights action as to the change in method of execution. *Black v. Rouse*, 587 So.2d 1359 (Fla. 1991) (State civil rights action where defendant claimed that prison officials violated his Eighth Amendment rights by providing him with inadequate medical treatment), or prevented Hill from filing a federal §1983 suit in 2000, or including that issue in his application to file a successive habeas as to his *Atkins* and *Roper* claims filed in the Eleventh Circuit in *In re Hill*, 437 F.3d 1080 (11th Cir. 2006).

[5] Florida has had sixteen (16) executions by lethal injection in the interim, from January 2000 to December 2005.

[6] In 2000, in *Sims*, 754 So. 2d at 666, n. 18, a multifaceted Eighth Amendment attack as to lethal injection was made:

"This claim includes several subissues: (1) lethal injection can be cruel and unusual punishment based on the number of reported problems in correctly administering such executions around the country; (2) the lack of written guidelines for carrying out lethal injection constitutes cruel and unusual punishment because the participants may not know what to do if a problem occurs; (3) the participants to the execution do not know what their function is; (4) under the protocols, the DOC intends to give the inmate his last meal an hour before the execution which contradicts standard anesthesia protocols on the consumption of food and fluids prior to administering sodium pentothal; (5) the testimony at the hearing conflicts with the written protocol on the procedure to be followed if the inmate does not die after the initial series of injections; (6) the written protocols conflict with state law concerning the witnesses to the execution; (7) the lack of specific protocols subjects Sims to a risk of pain, torture and degradation in violation of Eighth Amendment; (8) the act violates the separation of powers clause because (a) it unlawfully delegates to the DOC the power to determine and administer the lethal substances without explanation, standards or guidelines and (b) it gives the DOC the power to determine whether the method of execution has been elected or defaulted. Subissues (1) through (7) relate to the lack of specific written details about the execution procedures, the chemicals to be administered and the roles of the persons who will be carrying out the

and they are not based on the same evidence as the case Hill presented in state and federal district court, which raised only the April 2005 LANCET research letter as "newly discovered evidence."

C. Proceedings Below

On November 29, 2005, the Governor of Florida signed a new death warrant setting Hill's execution for January 24, 2006. Hill sought public records pursuant to Rule 3.852(h)(3), Fla.R.Crim.P.[9] from a plethora of state agencies including the Department of Corrections, (hereinafter referred to as "Department") seeking "all information that in any way" is related to the method the Department uses to carry out the execution, and information on the drugs administered, the dosages, and the order the drugs are administered. The Department provided information mandated by Florida's criminal rule of procedure governing the release of records during an active warrant and declined to provide records not in its possession.

execution."

[9] Rule 3.852(h)(3), Fla.R.Crim.P. provides in material part

> (3) Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency from which collateral counsel has previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:
>
> (A) that was not previously the subject of an objection,
> (B) that was received or produced since the previous request, or
> (C) that was, for any reason, not produced previously.

Pursuant to the trial court's scheduling order, Hill filed his third, successive state postconviction motion on December 15, 2005, which included an Eighth Amendment challenge to the particular drugs used in Florida's execution procedures. The trial court denied Hill's Eighth Amendment claim as procedurally barred, as well as Hill's public records request. The Florida Supreme Court affirmed in *Hill v. State*, 2006 Fla. LEXIS 8, * 7-8 (Fla.), *cert. denied*, 2006 U.S. LEXIS 1909 (2006), holding that as to Hill's Eighth Amendment claim:[10]

> The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So.2d at 665 n.17.

[10] The Florida Supreme Court found that Hill was satisfied with the responses to his demands for additional public records under Fla.R.Crim.P. 3.852(h)(3); however, the Court concluded the trial court was correct in denying Hill's non-specific demands made to three state agencies, including the Department of Corrections to produce "all information that in any way related to public execution," because they were untimely and fell outside the public records rule or because these claims were overly broad and unrelated to a colorable claim. *Moore v. State*, 820 So.2d 199, 204 (Fla. 2002) (recognizing that a trial court has discretion to review public records requests that are "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence"). "The record supported the trial court's finding Hill's requests were much broader than necessary to obtain information necessary to correlate the lethal injection study to Florida." *Hill*, 2006 Fla. LEXIS 8, *12 (Fla. 2006).

What Hill sought was not only every document in any way related to public executions, but also any and all documents relating to the sixteen (16) prior executions by lethal injection since 2000, including autopsy reports and other medical information. Many, if not all, are not kept by the Department, and the Department was not the custodian of the records.

> Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in *Sims*, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. *Id.* at 668. Therefore, we affirm the trial court's denial of this claim without an evidentiary hearing.

On January 20, 2006, Hill filed a 42 U.S.C. §1983 complaint challenging "the particular execution procedures the State intended to use," urging that these procedures "will cause unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment." J.A. 21. Hill sought a preliminary injunction prohibiting execution until his Eighth Amendment claim could be adjudicated, and a "permanent injunction[] barring defendants from executing Plaintiff in the manner they currently intend." J.A. 22. Hill expressly stated that he "is not challenging the statutory provision which allows for lethal injection as a method of execution" and was careful to "neither allege nor imply" that the State lacked the authority to execute him under a "different and lawful" method. Moreover, Hill made no offer as to what he perceived would be an acceptable alternate or different and lawful method.

On January 21, 2006, the district court found that under *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004), and *In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000), Hill's §1983 claim was "the functional equivalent of a successive petition for writ of habeas corpus." J.A. 15. Having recharacterized the §1983 claim in that manner, the district court dismissed the claim for

lack of subject matter jurisdiction because Hill had not complied with filing requirements regarding a successive petition per 28 U.S.C. §2244(b).

The Eleventh Circuit affirmed the district court on January 24, 2006, finding Hill's complaint sought "a permanent injunction barring his execution," J.A. 9, and agreed that Hill's §1983 was properly recharacterized as a successive habeas petition and therefore dismissible for lack of subject matter jurisdiction. Hill sought certiorari review and the Court granted review and a permanent stay on January 25, 2006.

SUMMARY OF ARGUMENT

The instant suit brought as a §1983 complaint is governed by federal habeas corpus jurisprudence because the end result is that whenever a state prisoner, like Hill, attacks the usual means or method of execution, he is directly or indirectly challenging the enforcement of an otherwise valid death sentence. Nothing in any of the Court's governing jurisprudence holds to the contrary.

The Court is being asked to clarify the line separating those claims that state prisoners may advance under §1983 from those they may not. Congressional intent and precedent dictate that a prisoner cannot use §1983 as a vehicle to collaterally attack claims that "necessarily imply the invalidity of" state court sentences, here, the method a state normally uses to perform lawful lethal injection executions. Hill's challenge to Florida's general method of execution sounds in habeas, rather than §1983, and that is where Hill is required to pursue his claims.

ARGUMENT

I. Whether a complaint brought under 42 U.S.C. §1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. §2254.

The answer is yes. Where a prisoner's claim falls squarely within the traditional scope of habeas corpus, habeas corpus is the exclusive federal vehicle for advancing that claim. Any §1983 challenge to an impending execution qualifies as falling within the traditional scope of habeas corpus and must be dismissed and brought as a habeas corpus action.

While Hill's claim is likely without merit to warrant relief, he is by no means without a federal forum within which to seek review.[1] State prisoners have two principal avenues for relief in federal courts: habeas corpus and §1983, each providing distinct remedies but with a common thread that each must raise violations of a constitutional right. By focusing on the substantive grounds upon which claims arise and the relief sought, the Court has differentiated habeas petitions from §1983 complaints. While acknowledging there are many claims and forms of relief exclusively the province of habeas corpus and others more appropriately brought by way of §1983 actions, Hill has selectively chosen a course of litigation that seeks to ensnarl both.

Hill's tactics in filing a last-minute stay request in order to "perfect his §1983 complaint" instead of seeking authorization to file a habeas corpus petition, exposes his effort to sidestep habeas review predicated on having no available habeas remedy. He urges the Court to sanction an exception to federal habeas, suggesting that §1983 should fill any defects in the habeas statute's remedial scheme, but nowhere explains why his claims and the relief sought are inappropriate to habeas. Rather, he postulates that because habeas corpus does not provide him relief, §1983 must. The Court has never held that §1983 is an alternative to habeas, if the latter is unavailable.

Hill's §1983 complaint is woefully inadequate in its development of a valid claim as to the "means not method," and in fact, Hill would not prevail in any civil rights complaint. Hill has no excuse for his dilatory filing and cannot assume he has successfully pled his deficiencies away. However, and more to the point, the fact that he would not prevail should not cloud the more important issue: under Hill's theory, §1983 provides an open-ended format in lieu of proceedings in capital cases governed by particular rules in §2254 context, thereby undercutting Congressional intent and goals as to deference to state court findings and finality in judgments and ignoring the Court's jurisprudence regarding the exclusivity of habeas relief as to issues of the fact or length of sentence.

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[1] Hill asserts he did not have the wherewithal to adjudicate "any challenge to lethal injection" in any prior pleading or occasion -- "much less the specific narrow challenge he raises to the particular procedures" the State proposes to use, because he "cannot raise the claim in a federal habeas corpus pursuant to 28 U.S.C. §2254 – because under the circuit's law, it is automatically deemed a second or successive petition and subject to immediate dismissal on that basis." Pet. Br. 15. Likewise, he argues he cannot raise the claim in an action brought pursuant to 42 U.S.C. §1983 "because Eleventh Circuit law holds that such claims are the 'functional equivalent' of a second or successive habeas petition, and must therefore be 'recharacterized' as such, and dismissed for lack of subject matter jurisdiction for failure to meet the requirements of 28 U.S.C. §2244(b)." Pet. Br. 15.

Under §1983, unlike habeas, prisoners only have minimum requirements for exhaustion; indeed, "exhaustion of state remedies is [generally] not a prerequisite to an action under §1983, even an action by a state prisoner." *Heck*, 512 U.S. at 480, and Hill never sought to challenge the lethal injection drugs at issue in any state administrative proceedings available. *But see Boyd v. Beck*, 404 F.Supp. 879 (E.D. N.C. 2005) (the court held in this §1983 case, that the state carries the burden of demonstrating that the prisoner has not exhausted.). Moreover, because §1983 has no deference requirement, it means little that Hill went to state court and raised his Eighth Amendment claim on the very facts which he relies on in federal court. *See* 28 U.S.C. §2254(d)(2) (state-court factual determination must stand unless "unreasonable"). Hill asserts presently that he is not challenging the method of execution *per se*, (although his state litigation speaks otherwise), yet there is no basis for the federal courts under §1983 to quiz him as to his most recent change of "theory".[12] And of course the reason he sought §1983 is obvious–he is precluded from filing a second or successive federal habeas. Under §1983, while statutes of limitations may bar litigation, any concept of finality in capital cases is wanting. Nothing prevents Hill from continually modifying his complaint after suffering an adverse ruling on a particular allegation. Even

[12] The fact that Hill has changed legal theories from his state Eighth Amendment suit to his §1983 complaint is not significant, because it is well established that he is under no obligation to plead legal theories under §1983. *See, e.g., Slaney v. Int'l Amateur Athletic Found.*, 244 F.3d 580, 600 (7th Cir. 2001). The only question is whether Hill's §1983 complaint satisfied the notice pleading standards of Rule 8, Fed.R.Civ.P. and, if the facts he has presented would entitle him to relief under any applicable legal theory. In ordinary civil proceedings, the governing rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed.R.Civ.P. 8(a)(2); and Jack M. Beermann, *Article: The Unhappy History of Civil Rights Litigation, Fifty Years Later*, 34 Conn. L. Rev. 981 (Spring 2002).

if the State were to change its lethal injection protocol to accommodate Hill's preferences, prior to a next execution, he could easily change his three drug cocktail complaint regarding the kind of barbiturate to be used or that the state has failed to properly engage in rule making.[13]

28 U.S.C. §2254 versus 42 U.S.C. §1983–In Principle

The core purpose espoused by Congress in granting federal courts the power to issue a writ of habeas corpus is to authorize any challenge, by a person in custody, regarding the legality of his custody, and to permit him an opportunity to secure release from any illegal custody. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); 28 U.S.C. §2254.[14] Habeas litigation requires

[13] Most illustrative is the case of *Morales v. Hickman*, 438 F.3d 926 (9th Cir. February 19, 2006), where the Ninth Circuit approved the district court's handling of Morales's attack as to the drugs used by California in their lethal injection protocols. The district court conditioned the denial on the state's compliance, formulated by the court, regarding two alternative conditions. The state agreed to the second condition which called for the presence of an anesthesiologist to ensure Morales was unconscious during the second and third stages of the lethal injection execution.

While hindsight reveals that the choice selected by the state proved problematic, no time was wasted in mounting Morales's second wave of attacks in the Plaintiff's Response to Modification of the Lethal Injection Procedure in *Morales*, filed February 16, 2006, Case Nos. C 06 0219 (JF) and C 06 926 (JF). Not only did Morales complain about the anesthesiologists' qualifications and medical training but, in footnote 1 he chastised the "process" arguing that "[I]ndeed, this new procedure is a gross violation of the State's Administrative Procedures Act, as well as the agencies own regulations ... Time has prevented a review of the Department Operations Manual and other Government Code sections that this may violate."

[14] *See* 28 U.S.C. §2254(d)(1) and (2), as amended 1996, which provides that habeas writs "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings," with two exceptions, consideration of decisions which are "contrary to" or "an

pursuit and exhaustion of all available state remedies. §2254(b)(1)(A). And, more relevant here, AEDPA allows the filing of any successive federal petition under specific, but restricted circumstances, after obtaining leave of court to do so.[15]

The civil action - established by §1983 - was Congress' attempt to redress grievances asserting deprivation of one's constitutional rights. In particular, the Court in *Monroe v. Pape*, 365 U.S. 167, 173-174 (1961), identified §1983 as the avenue with which to "override certain kinds" of discriminatory state statutes and to provide remedies where the state statutes were wanting--either due to "materially inadequate remedies" or "technically adequate, but inadequate remedies in practice". Section 1983 was enacted to provide federal court remedies to circumstances where the "claims of citizens" to enjoy the "rights, privileges, and immunities guaranteed by the Fourteenth Amendment" were abridged by state actors. As recognized in *Heck v. Humphrey*, 512 U.S. 477, 483 (1994), a "species of tort liability" was crafted by Congress, subject to rules governing common law torts, limited only by conventional notions of res judicata and collateral estoppel.

"*Preiser*" versus "*Heck*" –Reality

In *Preiser*, the Court observed that the essence of habeas corpus was to effectuate release. Congress intended habeas to be the appropriate remedy to attack the validity of the fact or length of confinement, and required state prisoners to litigate in habeas instead of §1983 actions because the "specific" habeas statute

unreasonable application of clearly established Federal Law," or decisions which are "based on an unreasonable determination of the facts in light of the evidence."

[15] *See* 28 U.S.C. §2244(b).

controlled the "broader" wording of §1983. *Preiser*, 411 U.S. at 489.

Preiser established the structural blueprint to evaluate which set of jurisprudence applies. Later decisions, such as *Wolff v. McDonnell*, 410 U.S. 539 (1974), offered more guidance as to where suits should lie. *Wolff* was part of the evolution from *Preiser* to *Heck*, and its analysis was refined by *Heck*. In *Wolff* the Court, in applying the two-fold analysis of *Preiser*,[16] found that Wolff's claims for "both damages and injunctive relief" should be handled thusly: as to any damages complained of, Wolff could proceed under §1983 because relief on damages of an illegal or faulty procedure would not result in habeas-like results; on the other matter, more pertinent here, requesting injunctive relief, the Court held Wolff was barred under *Preiser*, because it would result in immediate habeas-like relief. *Id.* at 555.

Enter *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck* a prisoner is unable to use §1983 where a judgment in his favor would "necessarily imply the invalidity" of a state sentencing decision. Essentially, the Court held §1983 is not available to a prisoner who collaterally attacks a state conviction or sentence, either directly or indirectly. Prisoners cannot secure a federal judgment that directly overturns a state death sentence by seeking an injunction vacating the ability of the state to enforce the sentence. Nor can they secure a federal judgment indirectly premised on a federal declaration finding a state's method of carrying out an execution, for example, sufficiently problematic so as to enjoin the state's ability, even "when a

[16] *Preiser*'s analysis questioned whether an action was an attempt to sidestep habeas requirements by challenging an unsullied conviction and whether, based on a specific factual pattern, the requested basis for redress would mean release from incarceration, and if so, promote "habeas-like" relief.

prisoner does not ask." Under *Heck*, if the federal judgment would "necessarily imply the invalidity" of the state "conviction or sentence," it is irrelevant that the prisoner does not ask the federal court to deliver the ultimate blow. *Heck*, 512 U.S. at 487

Heck incorporated and extended *Preiser's* rule,[17] under which prisoners, like Hill, asserting claims that fall within the

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[17] *Preiser* observed that "Congress has made the specific determination . . . that requiring the exhaustion of adequate state remedies," a necessary precondition of habeas relief when claims implicate state sentences, "will best serve the policies of federalism." *Preiser*, 411 U.S. at 492, n.10. Moreover, "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the . . . length of their confinement, and that specific determination must override the general terms of §1983." *Id.* *Preiser* determined whether a prisoner's claim falls within that universe by examining the relief sought – if he seeks to expedite his release, his claim is within the exclusive control of habeas.

A majority of the Court recognized that *Heck* is similarly rooted in the need to protect the scope of habeas and its attendant exhaustion requirement. The *Heck* majority did explain the "rule purely in §1983 terms without regard to the availability of habeas". See *Heck*, 512 U.S. at 491 (Thomas, J., concurring) ("Because the Court today limits the scope of §1983 in a manner consistent both with the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute . . . I join the Court's opinion."); *id.* at 499 n.4, 500, 503 (Souter, J., concurring, joined by Blackmun, Stevens and O'Connor, J.J.) ("The proper resolution of this case . . . is to construe §1983 in light of the habeas statute and its explicit policy of exhaustion."). *See also Spencer v. Kemna*, 523 U.S. 1, 20 (1997) (Souter, J., concurring, joined by O'Connor, Ginsburg, and Breyer, J.J.) ("The statutory scheme must be read as precluding such attacks . . . because *[Heck]* was a simple way to avoid collisions at the intersection of habeas and §1983.") (citations and internal punctuation omitted); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25, n.8 (Stevens, J., dissenting). *But see* Bruce Ellis Fein, *Heck v. Humphrey After Spencer v. Kemna*, 28 New Eng. J. on Crim & Civ. Confinement 1 (2002) (questioning whether a state prisoner ineligible for habeas review should be permitted to bring a civil rights suit that would impugn his conviction. – expounding on Justice Souter's concerns in *Spencer*.)

core of habeas must use habeas rather than §1983, to advance such claims.

In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court held that the precise relief sought by a prisoner is not relevant because *Heck* looks past any federal relief on the merits as it might impact the state decision, even if the prisoner does not expressly ask the federal court to nullify that decision. The Court concluded that the nature of the relief sought in a given case would not remove a claim from any *Heck* bar. Rather, the question was whether the nature of a prisoner's claim was such that any "affirmation of the claim" would imply that a state conviction or sentence was invalid. *Id.* at 645. It mattered not whether a prisoner sought damages or even just a declaratory judgment; if a successful claim would amount to a federal determination the state decision was so error-ridden that it was the type that should not be allowed to stand, the claim was barred in §1983. Claims advanced in *Balisok* – the denial of an opportunity to present a defense, and issues with suspect decision makers – if successful, would mean that the state decision was per se invalid. *Id.* at 647-48. *Clearly*, the claims were barred as "implying invalidity" and the prisoner could not get around this bar merely by choosing a form of relief that would leave the targeted decision formally untouched.

Any doubt was removed in *Muhammad v. Close*, 540 U.S. 749 (2004), when the Court observed that "conditioning the right to bring a §1983 action on a favorable result in state litigation or federal habeas" serves "the practical objective of preserving limitations on the availability of habeas remedies." *Heck* reflects that policy by looking beyond the relief sought, the focus of *Preiser*, and examining the indirect impact a claim may bear on a sentence; in Hill's case, the ability of the State to carry out an otherwise valid death sentence. A claim is barred if it would "necessarily remove" the legal foundation for such a decision, even if it stops short of requesting immediate cession of

enforcement of a sentence. *Heck* itself, which barred a claim "clearly not covered by the holding of *Preiser*," so held. *Heck*, 512 U.S. at 481.

In *Nelson v. Campbell*, 541 U.S. 637 (2004), the Court declined to resolve the issue presently here for review, acknowledging that it had never decided whether a challenge to a particular means of execution could be brought pursuant to §1983 or instead fell within the "core of federal habeas corpus."[18] The Court admonished the district court that if again that court was "confronted with a request for stay of execution, at that time the court would have to determine whether a request to enjoin Nelson's execution, 'rather than merely to enjoin an allegedly unnecessary precursor medical procedure, properly sounds in habeas.'" *Id.* at 648.[19]

Faced with the issue squarely here–Hill simply relies on *Nelson*. However, his reliance is erroneous and *Nelson* does not control. Historically, when a claim meets both the habeas requirements and seeks relief that would yield habeas-equivalent results, that case is a pure "core habeas case," and Hill loses as to his §1983 complaint.[20] Where a claim falls within the "hybrid or grey zone," that is, cases that meet the habeas jurisdictional requirements but do not seek results that have a habeas equivalent yield, Hill also loses because in the final analysis the end result "necessarily implies invalidity of a sentence." *Accord, Muhammad v. Close*, 540 U.S. at 750-751. Hill's claims fall into all of the above-- if he asserts that the drugs used would be cruel and unusual, he has presented a core habeas challenge and any §1983 complaint would be thrown out, and if he argues that the state actors will use drugs that might potentially be cruel and unusual but, if they find an alternative, then that's okay–he has still presented a core habeas challenge to the sentence and any §1983 complaint should be thrown out. *Preiser*, 411 U.S. 500; *Balisok*, 520 U.S. 644.

Hill, like all capital defendants, is in custody and satisfies habeas jurisdictional requirements. His prayer seeks not only a preliminary injunction order to delay his execution, but also calls for a permanent injunction to prevent entirely his execution by lethal injection, like the defendant in *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004).[21]

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[18] The Court in remanding suggested that if "the District Court concludes that use of the cut-down procedure as described in the complaint is necessary for administering the lethal injection, the District Court will [then] need to address the broader question, left open here, of how to treat method-of-execution claims generally." *Id.* at 646 (emphasis added).

[19] See Justin B. Shane, *Case Note: United States Supreme Court Nelson v. Campbell, 124 S. Ct. 2117 (2004)*, 17 Cap.Def.J. 107 (Fall, 2004), while agreeing that "[T]he Court limited its holding (in *Nelson*), to §1983 claims that do not necessarily challenge the method of execution," citing *Reid v. Johnson*, 105 F. Appx. 500, 503 (4th Cir. 2004), and *Harris v. Johnson*, 376 F.3d 414, 416 (5th Cir. 2004), urged that "attorneys challenging execution procedures after the denial of their clients' federal habeas corpus petitions must propose acceptable alternative execution procedures when framing their §1983 claims in order to avoid the possibility of the court construing the claim as a general method of execution challenge."

[20] To be sure, there are cases that are purely §1983 cases, those cases, of course, do not meet any of the habeas requirements and seek no relief that yield habeas-equivalent results.

[21] In *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996), and *Hill v. Hopper*, 112 F.3d 1088 (11th Cir. 1997), the Eleventh Circuit held that §1983 challenges to the constitutionality of electrocution as a means of execution were the "functional equivalent" to a petition for habeas corpus and were therefore subject to the procedural requirements governing second or successive petitions. The court's reasoning being that *Heck* states that the relevant inquiry is "whether a judgement in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . ." 512 U.S. at 487. Obviously, if the plaintiff loses, the validity of the conviction or sentence has not been called into question. But *Heck* would be meaningless if the possibility that the plaintiff might lose his §1983 suit were sufficient to establish that the suit does not necessarily imply the invalidity of the

Hill is trying to "get around" state remedies and a habeas outcome.[22] While his claim is described as the "means not the method" challenge, in reality the "means becomes the method." *Heck*, 512 U.S. at 490 (dismissal of a damages claim where claim ultimately challenged the legality of the conviction.). Moreover, the Court has not yet endorsed the proposition that a civil rights action is the appropriate vehicle for litigating and eliminating any potential risk of human error associated with a general method of execution on the eve of that execution. *Nelson*, 541 U.S. at 642-643; *Lonchar v. Thomas*, 517 U.S. 314, 329 (1996); *Gomez v. United States Dist. Court*, 503 U.S. 653, 653-54, (1992). Seeking to enjoin a scheduled execution based on such risks is in substance "a challenge seeking to interfere with the sentence itself, and thus is properly construed as a petition for habeas corpus." *In Re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997); *Nelson*, 541 U.S. 647.

Even if Hill's case, as pled, meets the habeas jurisdictional requirements but does not seek habeas-equivalent yield, it seems this is where Justice Thomas' concurrence in *Heck* identified the elephant in the room-- "...it is we who have put §1983 and the habeas statute on what Justice Souter appropriately terms a 'collision course... .' . . .Given that the Court created the tension between the two statutes, it is proper for the Court to devise limitations aimed at ameliorating the conflict, provided that it does so in a principled fashion." *Heck*, 512 U.S. at 91. Believing *Heck* had done so, Justice Thomas commented because, "the Court today limits the scope of §1983 in a manner consistent both with the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute, *ante*, at 483, and with the state of the common law at the time §1983 was enacted, *ante*, at 484–486, and n. 4, I join the Court's opinion." *Id.* at 491.

In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Court again wrestled with the question–holding that "civil tort actions are not appropriate vehicles for challenging the validity of an "outstanding criminal judgment," and in sum found, based on the torturous history that preceded it, ". *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace *§1983* actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's *§1983* action is barred (absent prior invalidation) - no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal

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conviction or sentence. That is why the *Heck* inquiry considers the effect on the conviction and sentence if the plaintiff is successful. If the *Felker* and *Hill* prisoners were successful--in other words, if the court determined that electrocution was an unconstitutional means of execution--it would "necessarily imply" the invalidity of their sentences of death by electrocution. Accordingly, under *Heck*, a §1983 suit does not lie in those cases.

[22] Hill did challenge the constitutionality of Florida's lethal injection method in the state postconviction litigation asserting that newly discovered evidence had come to light in a recently published (April 2005) research letter in The LANCET, which questioned the utilization of the drug protocols in carrying out a lawful execution. Although this research letter did not involve any Florida executions, Hill reasoned that the examples used therein were close enough to the protocol used in Florida and therefore compelling. The Florida Supreme Court held, in *Hill v. State*, 2006 Fla. LEXIS 8, 31 Fla L Weekly S31, S32 (Fla.) *cert. denied*, 2006 U.S. LEXIS 1909 (2006), that Hill's cruel and unusual punishment argument was wanting. ". Hill's claim is that a research letter published in April 2005 in The Lancet presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. *See* Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 Lancet 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided *Sims v. State*, 754 So.2d 657 (Fla. 2000). The trial court denied this claim. We agree."

prison proceedings) -- *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration."[23]

The Court found in *Wilkinson* that defendants Dotson (challenging parole eligibility proceedings) and Johnson (challenging parole-suitability proceedings) both presented claims which "would not inevitably lead to release." Embracing this outcome, Justice Scalia, in concurring, observed:

> Finally, I note that the Court's opinion focuses correctly on whether the claims respondents pleaded were claims that may be pursued in habeas--not on whether respondents can be successful in obtaining habeas relief on those claims. *See, e.g., ante*, at ____, 161 L. Ed. 2d, at 262. Thus, for example, a prisoner who wishes to challenge the length of his confinement, but who cannot obtain federal habeas relief because of the statute of limitations or the restrictions on successive petitions, *§§2244(a), (b), (d)*, cannot use the unavailability of federal habeas relief in his individual case as grounds for proceeding under *§1983*. *Cf. Preiser, supra*, at 489-490, 36 L.Ed.2d 439, 93 S. Ct. 1827 ("It would wholly frustrate explicit congressional intent to hold that [state prisoners] could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings").

Wilkinson, 125 S.Ct. at 1251 (Scalia, J., concurring).

What is apparent from the Court's discussion in *Wilkinson*[24] and to a lesser degree in *Nelson*, is that in viewing the problem more pragmatically, a clearer line is closer to being drawn whether viewing a case from a complainant, like *Wilkinson*, who argued his case was not controlled by habeas jurisprudence but rather §1983 or *here*, where the state argues that the means and method are one and the same and therefore habeas, not §1983, applies.[25]

Unsurprisingly, these issues--the method and means of carrying out an execution--are populating the federal district courts as a result of the Court's most recent decisions. Indeed, the Court's prediction in *Nelson*, that its decision would have narrow application has proven overly optimistic and the reality of Respondents' fears, as expressed in *Nelson*, realized:"...that a decision to reverse the judgment of the Eleventh Circuit would open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests." *Nelson*, 512 at

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[23] See Benjamin Vetter, *Comment Habeas, Section 1983, and Post-conviction Access to DNA Evidence*, 71 U. Chi. L. rev. 587 Spring, 2004. *See Harvey v. Horan*, 278 F.3d 370, 374-80 (4th Cir. 2002) (treating §1983 action requesting access to DNA evidence as a successive application for habeas relief). But see, *Bradley v. Pryor*, 305 F. 3d 1287 (11th Cir. 2002) (approving the use of §1983 to request access to DNA testing of evidence). Apparently, the Eleventh Circuit is able to identify those claims that were not habeas-equivalent yielding

[24] See Timothy P. O'Toole and Gionanna Shay, *Feature: Wilkinson v. Dotson: How A 'Boring' Parole Case Can Reduce Government Forum-Shopping*, 29 Champion 38, December, 2005 (finding that "[D]espite the *Preiser-Wolff-Heck-Balsok* quartet, before *Wilkinson*, many lower courts continued to relegate to *habeas* even prisoner claims that did not necessarily invalidate a conviction or sentence.")

[25] In *Nelson*, Justice O'Connor expressed grave concerns about the inconsistencies in what result *Nelson* truly intended -- "By asking for broader relief than necessary, petitioner undermines his assertions that (1) his §1983 suit is not a tactic for delay, and (2) he is not challenging the fact of his execution, but merely a dispensable preliminary procedure." *Nelson*, 541 U.S. at 648.

649. For all intents and purposes, every State actively seeking to carry out capital sentences has been impacted. The general argument that, the "drug cocktails" used by every capital state but one and the federal government, is the core allegation in virtually all capital defendants' §1983 suits. Allowing §1983 complaints relating to the method of executions has created a "litigation hold" in those jurisdictions awaiting resolution of the §1983-habeas dilemma.

Nelson answered the simpler question, whether a capital prisoner could bring his challenge to the non-protocol cut-down procedure Alabama authorities announced would be used to carrying out Nelson's execution as a §1983 action. The Court determined that inquiries into whether a procedure is necessary may include whether the procedure is statutory, whether it is physically necessary in order to perform the lethal injection and whether acceptable alternates exist. The Court majority forewarned, that "[W]e have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution--e.g., lethal injection or electrocution--fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the 'conditions' nor the 'fact or duration' label is particularly apt." Given the fact that a state could to elect to allow a defendant dictate the drugs to be used, for example, the Court majority also noted that, "...imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, *see* Ala. Code §15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little

sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. *See Calderon v. Thompson*, 523 U.S. 538, 556-557 (1998); *In re Blodgett*, 502 U.S. 236, 238, 116 L.Ed.2d 669, 112 S.Ct. 674 (1992) (*per curiam*); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them")." *Nelson* 512 U.S. 644.

Hill insists that §1983 is an appropriate vehicle for his claims, Pet. Br. 18, the principal basis being §1983's broad language authorizing "suit[s] in equity" against state actors who deprive citizens "of any rights, privileges, or immunities secured by the Constitution." *Preiser* and the cases that followed, however, clearly reject the notion that "the broad language of §1983" covers a prisoner's request for equitable relief is "not conclusive." 411 U.S. at 489. "[D]espite the literal applicability of [§1983's] terms," the "specific federal habeas corpus statute" is the exclusive remedy where it "clearly applies." *Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) ("In the manner of [*Preiser*], I read the 'general' §1983 statute in light of the 'specific' federal habeas statute ....").

In *Preiser*, the Court held that a state prisoner who challenges his criminal sentence on constitutional grounds and seeks equitable relief from that sentence, "is limited to habeas corpus" and may not pursue his challenge via §1983. *Id.* at 489; *Lonchar v. Thomas*, 517 U.S. 314, 329 (1996) (reiterated that the various restrictions on habeas practice "apply to a suit challenging the method of execution, regardless of the technical form of action." (citing *Gomez v. United States District Court*, 503 U.S. 653 (1992)). Understandably, Hill seeks to avoid *Preiser*. He suggests §1983 cases do not challenge a conviction or sentence. *Preiser* however, recognized that state prisoners may "evade [habeas] requirement[s] by the simple expedient of putting a different label on their pleadings." 411 U.S. at 489-90. Substance, not form, determines whether a claim is characterized

a §1983 complaint or a habeas petition. *See Lonchar*, 517 U.S. at 329; *Preiser*, 411 U.S. at 489-90. Hill also contends his claim "does not attack lethal injection per se" but instead merely challenges the constitutionality of the means to accomplish his execution. Pet. Br. 20. He is incorrect.[26]

It would seem logical that a workable solution--a "line-drawing" outcome distinguishing bona fide §1983 claims from habeas claims--is ripe for implementation. Such a solution would not be disruptive to either habeas or §1983 case law and would bring clarity and force to Congress' intent as to both. Rightfully, under this line-drawing outcome, a prisoner who cannot file a viable habeas challenge to his death sentence *per se* -- because his petition is successive, or because he has not exhausted state remedies, or otherwise -- would not be permitted to simply recast his claim from one challenging lethal injection to some lesser degree of stopping his execution, and rename it a §1983 complaint.

The defensible line distinguishing habeas corpus petitions from valid §1983 complaints in capital sentencing would allocate challenges to death sentences *per se* (e.g., method-of-execution, chemical-composition, established protocols), on the habeas side

[26] Indeed, in *Nelson*, the defendant there all but acknowledged that a "chemical composition challenge" - that is, a "challenge to the chemicals used for lethal injection" - "constituted a challenge to a sentence of death by lethal injection" that would require proceeding via habeas, not §1983. The Court has refused stays of execution in a slew of cases in which capital prisoners have presented "drug-composition claims" in §1983 complaints. *See, e.g., Robinson v. Crosby*, 124 S.Ct. 1196 (2004) (cert. denied); *Roe v. Taft*, 124 S.Ct. 1196 (2004) (cert. denied); *Zimmerman v. Johnson*, 124 S.Ct. 979 (2004) (cert. denied); *Bruce v. Dretke*, 124 S.Ct. 1143 (2004) (cert. denied); *Williams v. Taft*, 124 S.Ct. 1142 (2004) (cert. denied); *Ward v. Parks*, 124 S.Ct. 1142 (2004) (cert. denied); *Beck v. Bowser*, 124 S.Ct. 980 (2004) (cert. denied). *See also Lonchar*, 517 U.S. at 329 ("method of execution" claim must proceed on habeas, not via §1983).

of the line. Challenges as found in *Nelson* that have a necessary affect on the execution of a death sentence, such as acts or procedures that are necessary predicates or, conditions precedent, to the enforcement of a death sentence would likewise fall in the habeas column where the claim is a "general attack" compared to a case that is a fact-specific assertion, as articulated by the Court in *Nelson*, "...that venous access is a necessary prerequisite, does not imply that a particular means of gaining such access is likewise necessary." If, however, the cut-down method was mandatory by law, or the petitioner was unable or unwilling to "concede acceptable alternatives," the State's argument "would have ample weight," and therefore would fall nearer the line but still on the habeas side. Other constitutional claims, like prison-conditions claims, which have no "necessary affect" on the imposition of a death sentence, would fall on the §1983 side, in keeping with cases that have traditionally been considered conditions of confinement cases.

No doubt, a line drawing outcome would be understood and, as importantly, would result in more effective litigation without grave disruption or strain to traditional habeas or civil rights concepts. No longer would there be a need for linguistic gymnastics in pleading a case, satisfying or imposing Congressionally mandated requisites or strained decisions. Differences in cases will no longer reflect divergent decisions bottomed on the number of outcomes possible multiplied by the number of federal district courts entertaining lethal injection allegations.[27] No longer would federal courts be required to

[27] Recent litigation nationwide has resulted in a plethora of inconsistent outcomes predicated on the same basic facts: *Morales v. Hickman*, (Nos. C 06 219 JF & C 06 926 JF RS) (N.D. Cal. 2006) (effectively, stopping all enforcement of California's capital statute); or *Anderson v. Evans*, 2005 U.S.Dist. LEXIS 39407 (December 20, 2005) (holding that the "drug cocktail" used in Oklahoma (the first state to embrace lethal injection in 1977) -- justifies a finding of substantial risk of serious

avoid pegging a case for what it is-- the "functional equivalent" or a "second or successive" habeas.

II. Whether, under this Court's decision in *Nelson v. Campbell*, 541 U.S. 637 (2004), a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. §1983.

The answer is no. Hill filed his complaint cloaked in §1983 trappings, realizing his access to federal habeas would be foreclosed because he could not comply with various restrictions on federal habeas practice. *Gomez v. United States District Court*, 503 U.S. 653, 653 (1992). Left to speculate as to what differences a properly filed habeas would look like, it is evident that Hill's §1983 complaint resembles in form and substance any habeas Hill would have filed as to this issue.[2]

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injury during execution and deliberate indifference on the part of the state actors), and *Murphy v. Oklahoma*, 124 P.3d 1198, 1209 n. 23 (Okla. Crim. App. 2005), or *Moody v. Beck*, Case No. 5:06-CT-3020-D (E.D. N.C. March 14, 2006) (finding neither a basis to overcome the dilatory filing nor any reason to grant a stay challenging a chemical composition attack); or *Evans v. Saar*, 2006 U.S. Dist. LEXIS 4418 (February 1, 2006) (Holding no unnecessary risk of unconstitutional pain or suffering which would disallow or restrain use of three drug protocol based on similar facts as found in Oklahoma), *Abdur' Rahman v. Bredesen*, 2005 Tenn. LEXIS 828 (Tenn. Oct. 17, 2005)(the federal courts becoming the micro managers of state execution procedures), to name a few.

[2] Contemporaneous to his §1983 complaint in federal district court, on January 20, 2006, Hill filed an application to file a successive habeas in the Eleventh Circuit in *In re Hill*, 437 F.3d 1080 (11th Cir. 2006), raising both an *Atkins v. Virginia*, 536 U.S. 304 (2002) (mental retardation), claim and a *Roper v. Simmons*, 543 U.S. 551 (2005) (mental age) claim. The Eleventh Circuit denied his application on January 24, 2006, finding that Hill waited and was therefore 29 months too late in bringing the mental retardation claim.

In disposing of the cut-down procedure as a §1983 complaint, the *Nelson* Court reasoned that this holding "... is consistent with our approach to civil rights damages actions, which, like method-of-execution challenges, fall at the margins of habeas." *Nelson*, 541 U.S. 646. Recognizing that "damages are not an available habeas remedy," the Court observed that "we have previously concluded that a §1983 suit for damages that would "necessarily imply" the invalidity of the fact of an inmate's conviction, or "necessarily imply" the invalidity of the length of an inmate's sentence, is not cognizable under §1983 unless and until the inmate obtains favorable termination of a state, or federal habeas challenge to his conviction or sentence," citing *Heck* and *Balisok*. "This 'favorable termination' requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute. *Muhammad*, 540 U.S. at 754.

Here, Hill talks about the "two lines of clear authority converg[ing]," premised on a notion that he has "an unassailable right to proceed via §1983 based on this Court's ruling in *Nelson.*, or via habeas because his "pleading" was "improperly dismissed as a "second or successive" claim under the logic of *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000). Specifically, Hill contends that his claims did not become ripe until long after his first "federal habeas proceedings concluded." Not so.

His argument for relief no matter the style of the case, is, "even if the Eleventh Circuit were correct," ..."entitlement to raise his claim in a §1983 proceeding would be defeated if the claim were tested on the rules applicable to second or successive habeas petitions." P. Brief 16. Therefore he argues "the plain fact is that the latter rules would *permit* a habeas adjudication of Mr. Hill's cruel and unusual-method-of-execution claim." P.

Brief 16. Hill protests that his "resort to the civil remedy specifically designed by Congress for the relief of persons imminently threatened by irremediable state action that would violate their federal civil rights is in no sense an end-run around the jurisdictional limits of 28 U.S.C. §2244(b)." *Id.* at 16.

Respectfully, this cannot be so, as there is nothing "ancillary" about Hill's constitutional challenge to the death sentence that does not specifically undermine it.

Hill filed under §1983 not because it was the appropriate federal forum but rather because he knew he was foreclosed from any habeas corpus relief. Having litigated one habeas corpus petition challenging his conviction and death sentence, he was facing, under AEDPA's restrictions a bar on "second or successive habeas corpus." 28 U.S.C. §2244(b). Congress' "streamlining" of the habeas process severely restricted prisoners' ability to file "second or successive" habeas pleadings. In fact, 28 U.S.C. §2244(b), provides for dismissal, without exception, of any claim raised in a "second or successive" petition that "was presented in a prior application." And with"new claims" raised in a second or successive petition, like Hill's, "not presented in a previous application," 28 U.S.C. §2244(b)(2), requires dismissal except for two narrow circumstances: (i) where the claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" (§2244(b)(2)(A)); or (ii) where both the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and the facts underlying the claim established by clear and convincing evidence that the prisoner is

actually, factually innocent "of the underlying offense" (§2244(b)(2)(B)).[34]

Hill does not fall within either of AEDPA's narrow exceptions. Hill's first habeas petition was final prior to Florida's adoption of a lethal injection method in 2000. Hill's claim, therefore, would still be defective because he cannot satisfy the factual predicate required pursuant to §2244(b)(2)(B), that the claim could not have been discovered earlier due to the change in execution method.[35] Thus, AEDPA's successive-petitions bar

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[34] See R. Hertz & J. Liebman, 2 Federal Habeas Corpus Practice and Procedure §28.3e, at 1318 (4th ed. 2001) (explaining AEDPA's shift from disjunctive cause-or-innocence standard to conjunctive "cause and innocence" standard).

[35] On June 20, 2003, Hill, represented by current counsel, filed his second, successive trial court postconviction motion arguing a "four-prong" attack premised on *Ring v. Arizona*, 536 U.S. 584 (2003). The trial court denied relief and the Florida Supreme Court affirmed that denial in *Hill v. State*, 904 So.2d 430 (Fla. 2005). Hill elected not to pursue a challenge to Florida's change in method of execution albeit other state prisoners similarly circumstanced did. *Provenzano v. State*, 761 So.2d 1097, 1099 (Fla. 2000) (concluding that "execution by lethal injection does not amount to cruel and or unusual punishment"); *Provenzano v. Moore*, 744 So.2d 413, 415 (Fla. 1999) (stating that "Florida's electric chair is not cruel or unusual punishment"), *cert denied*, 528 U.S. 1182 (2000); *Power v. State*, 886 So.2d 952 (Fla. 2004) (rejecting constitutional challenge to execution by lethal injection and electrocution); *Johnson v. State*, 804 So.2d 1218, 1225 (Fla. 2001) (rejecting constitutional challenge to execution by lethal injection and electrocution); *Sochor v. State*, 883 So.2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment).)

Hill did raise his Eighth Amendment claim as to the constitutionality of Florida's method based on the drug cocktail as one of his claims in his "third successive postconviction motion" filed December 15, 2005, as a direct result of a new warrant signed on November 29, 2005. For the first time in any pleading Hill contended that the method was unconstitutional. The trial

would preclude Hill from "pursuing his Eighth Amendment challenge to Florida's lethal-injection procedures in a habeas corpus petition."[31]

To overcome any deficiencies outstanding, Hill now argues that his claim should not be considered successive, based upon the Court's holdings in *Martinez-Villareal* and *Slack*. His reliance is misplaced. In sum, *Martinez-Villareal* addressed whether a federal habeas petition filed after the initial filing was dismissed as premature should not be deemed a "second or successive" petition barred by §2244; whether "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Martinez-Villareal* 523 U.S. at 645. *Slack* dealt with whether a federal habeas petition filed after dismissal of an initial filing for non-exhaustion should be considered a "second or successive petition," because "the complete exhaustion rule" has become a "trap" for "'the unwary pro se prisoner.'" *Slack*, 529 U.S. at 487. Hill's case does not fall within either circumstance.

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court rejected his argument and the Florida Supreme Court affirmed *Hill v. State*, 2006 Fla. LEXIS 8 (Fla.), *cert. denied* 2006 U.S. LEXIS 1909 (February 27, 2006). This Court's denial of certiorari review issued as to the Eighth Amendment claim issued approximately one month after certiorari was granted here.

[31] AEDPA is forthright. While prior to AEDPA a new claim could be presented in a successive petition on a showing either (i) that the factual basis for the claim was not available at the time the first petition was filed, or (ii) that the petitioner was likely to be innocent. *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991). §2244(b)(2)(B), as amended by AEDPA, clearly represents Congress' tightening of the successive-petition standard by requiring a showing of both (i) a newly-discovered factual predicate, and (ii) probable actual innocence, ("cause and innocence"). *Calderon v. Thompson*, 523 U.S. 538, 558 (1998). Hill's attempted end-run, if permitted would eliminate the actual-innocence limitation from the statute.

Martinez-Villareal's habeas petition alleged a "competency-to-be-executed" claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). His *Ford* claim was raised in a prior habeas petition but "dismissed as premature ... because his execution was not imminent and therefore his competence to be executed could not be determined at that time." *Martinez-Villareal*, 523 U.S. at 644-45. Martinez-Villareal moved the district court to reopen his earlier-filed *Ford* claim following the issuance of a warrant, but based upon AEDPA's successive-petitions bar, the lower court refused. The Ninth Circuit reversed, and this, while affirming, Court held only that Martinez-Villareal had not filed a "second or successive" habeas petition at all but, instead, had simply moved to reopen his first petition. *See Martinez-Villareal*, 523 U.S. at 643. This unique situation, where a habeas petitioner moves to reopen an earlier filed petition to obtain an initial merits determination of a previously unripe claim, had no AEDPA bar. The Court expressly rejected a broad exception to §2244(b) for all claims that could not have been raised in a first petition. The later petition in *Martinez-Villareal* was "deemed a first petition because the petitioner there had moved to reopen a previously-filed claim." In *Slack*, a second petition was "deemed a first" only because the actual first petition was dismissed on exhaustion grounds and, logically should be treated "as though it had not been filed." *Slack*, 529 U.S. at 488.

Hill also argues that because the State has protocols that are drafted by the Department rather than detailed in the lethal injection statute, he somehow could not have identified the issue raised that the chemicals to be used, could potentially be injurious. This argument is unworthy. First, a plethora of Florida capital defendants have made the identical challenge in state and federal courts. The fact that their claims are without merit, of course, does not mean there is a lack of an identifiable issue. Second, it strains credulity to suggest that Hill is the only defendant who could not figure out how to develop this claim.

While a decision on the appropriate legal standard is a must in clarifying which federal forum for relief applies, in actuality Hill is without recourse under either §1983 or §2254. *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992). As the Court held in *Gomez*, it matters not how Hill "frames" his claim, because both ultimately involve "an equitable remedy," to enjoin the state from carrying out Hill's execution. "Equity must take into consideration the State's strong interest in proceeding with its judgment" and Hill's "obvious attempt at manipulation." Hill had the wherewithal to bring his "method challenge" as early as 2000, with the change in the Florida execution procedures and when capital inmates such as Sims make similar claims. *Sims*. Prior to his December 15, 2005, successive post conviction motion, Hill never even hinted at discontent with the Florida lethal injection procedures during that interim.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,

v.

JAMES R. McDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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I

REPLY BRIEF

Nothing in the briefs filed by respondents and their *amici* justifies the holding of the Eleventh Circuit that the federal courts lack jurisdiction to hear Mr. Hill's challenge to the particular lethal injection procedures Florida intends to use to execute him. Respondents have not advanced a comprehensible argument for denying Mr. Hill a forum to adjudicate his Eighth Amendment claim. Nor does the *amicus* brief of the States offer a principled legal justification for that result.[1] The United States at least attempts to

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[1] The States offer "a cautionary tale" to argue for abandonment of the rule this Court unanimously announced in *Nelson v. Campbell*, 541 U.S. 637 (2004). The tale they tell is one about supposed "abuse" by Nelson in proceedings on remand from this Court. Of course, if any such "abuse" occurs, the district court has equitable discretion to hold that Nelson (or any other § 1983 plaintiff) is disentitled to relief under *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653 (1992) (per curiam) – a point this Court made explicitly in *Nelson*, 541 U.S. at 649. In fact, however, *amici*'s description of the remand proceedings in *Nelson* is a gross distortion. Nelson has not altered his position on remand. As this Court recognized, Nelson's position from the outset included challenges to the "cut-down" procedure "as well as the warden's refusal to provide reliable information regarding the . . . protocol." *Id.* at 645-46. On remand Nelson has continued to assert that central line placement is a constitutional way to execute him; he has sought only the information needed to assure it is done by qualified personnel under proper conditions. *See* Hearing Tr. 8, *Nelson v. Campbell*, No. 2:03-CV-1008-T (M.D. Ala. Oct. 6, 2004). The sole reason the *Nelson* litigation remains unresolved is because Alabama officials have refused to prepare a protocol that specifies the procedure so that it can be evaluated medically. Moreover, *amici*'s "cautionary tale," which is crafted to convince this Court that *Nelson* has created a device for obstructing executions in Alabama, notably fails to disclose that Alabama's Attorney General has moved to set six execution dates since the decision in *Nelson*; all

advance legal arguments for denying Mr. Hill the right to invoke § 1983 (or in the alternative to proceed in habeas), but its position rests on mischaracterizations of this Court's decisions in *Nelson v. Campbell*, 541 U.S. 637 (2004), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

The long and short of it is that *Nelson v. Campbell* controls here and entitles Mr. Hill to pursue his claims in a § 1983 action. As *Nelson* recognized, "[a] suit seeking to enjoin a particular means of effectuating a sentence of death" is a proper § 1983 action because it "does not directly call into question the 'fact' or 'validity' of the sentence itself – by simply altering its method of execution, the State can go forward with the sentence." *Nelson*, 541 U.S. at 644. Mr. Hill advances precisely such a claim. Nor is there any reason to deny Mr. Hill a § 1983 cause of action on the theory that his § 1983 proceeding constitutes an evasion of the limitations imposed on habeas petitions. Even if brought as a habeas action, his Eighth Amendment claim could not be characterized as a second or successive petition under *Slack* and *Martinez-Villareal* because it did not ripen until after Mr. Hill's first federal habeas proceedings ended. Respondents and the United States can dispute that conclusion only by treating the dissents in *Slack* and *Martinez-Villareal* as though they were the opinions of the Court.

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of those executions were carried out; in none of them did the inmate scheduled for execution file a § 1983 challenge to the method of execution. *See* Alabama Dep't of Corrections, Inmates Executed in Alabama, *available at* <http://www.doc.state.al.us/execution.htm> (last visited Apr. 16, 2006) (listing prisoners executed in Alabama and their dates of execution).

ARGUMENT

I. MR. HILL'S CLAIM IS PROPERLY BROUGHT UNDER § 1983.

1. Neither respondents nor their *amici* offer any persuasive reason for refusing to allow Mr. Hill to pursue his Eighth Amendment claim in a § 1983 action. Although respondents suggest that all challenges to procedures used to carry out lethal injections are at the "core" of habeas (Fla. Br. 22-23) and therefore prohibited in § 1983 actions, that contention ignores virtually everything the Court said in *Nelson v. Campbell*, as well as decades of this Court's jurisprudence. *See Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Presier v. Rodriquez*, 411 U.S. 475 (1973).

For its part, the United States at least acknowledges the well-established law set forth in *Preiser* and its progeny, which dictates that § 1983 is unavailable only for challenges to the fact or duration of an inmate's sentence – *i.e.*, challenges that, if successful, would invalidate (or necessarily imply the invalidity of) a sentence. *See* U.S. Br. 9-11, 12-13. As the United States recognizes in theory, a challenge to the particulars of a State's lethal injection procedure falls within the category of claims that may properly be brought in a § 1983 action. If successful, such a challenge does not "*necessarily* prevent [the State] from carrying out its execution," *Nelson*, 541 U.S. at 647, because "by simply altering its method of execution, the State can go forward with the sentence," *id.* at 644. *See* U.S. Br. 12-13, 18-19. In contrast, the category of challenges that must be brought in habeas proceedings comprises those cases "where a prisoner contends that execution per se constitutes cruel and unusual punishment – *i.e.*, that the particular method of execution being contemplated by the State *and any other method of execution* would be unconstitutional." U.S. Br. 13.

Mr. Hill's challenge is indisputably in the former category. He does not contend that "execution per se constitutes cruel and unusual punishment." *Id.* He does not seek relief "permanently enjoin[ing] the use of lethal injection" or relief that would require "statutory amendment or variance" before the State could carry out a lethal injection. *Nelson*, 541 U.S. at 644. Nor would the relief Mr. Hill seeks necessarily imply the invalidity of his sentence. Under the well-established law reflected in *Nelson*, therefore, Mr. Hill has a right to invoke § 1983.[2]

2. The United States nevertheless contends that Mr. Hill's claim should be treated as though it were in the latter category and relegated exclusively to habeas. That counterintuitive result is dictated, the United States contends, by the fact that Mr. Hill's complaint "nowhere specifically identified an alternative method by which he could permissibly be executed." U.S. Br. 14. But it has never been

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[2] The United States seeks to distinguish *Nelson* from Mr. Hill's case on grounds that cannot withstand the slightest scrutiny. The United States describes as an "essential" feature of *Nelson* that the cut-down procedure Nelson challenged could have been challenged by a prisoner had Alabama sought to use it "for the purposes of medical treatment." U.S. Br. 12. That factor does not distinguish Mr. Hill's case because an inmate could use § 1983 to challenge the reckless administration of torturous, medically unsound anesthetic or other drugs as a medical treatment. Nor is the United States correct that an inquiry into whether an inmate's claim for relief would "necessarily prevent [the State] from carrying out its" sentence is applicable only to so-called "hybrid" cases, and not to direct challenges to lethal injection procedures. *See* U.S. Br. 16-18. In *Nelson*, the Court stated unambiguously that "[i]n the present context [*i.e.* a challenge to a lethal injection procedure], focusing attention on whether [the] petitioner's challenge . . . would necessarily prevent Alabama from carrying out its execution" was the appropriate test for deciding whether the inmate could pursue his claim in a § 1983 action. 541 U.S. at 647.

the law that plaintiffs invoking § 1983 to challenge the constitutionality of the manner in which their sentences are carried out must propose a specific constitutional alternative, or must instead proceed in habeas if they do not. Nor should the Court adopt any such rule now.

First, because the courts below dismissed this case on the pleadings, the dismissal can be upheld on the ground proposed by the United States only if this Court requires § 1983 plaintiffs challenging execution procedures to specify a constitutional alternative in their complaints. Even if such a change in pleading rules were desirable, it could not properly or fairly be ordered judicially to apply retrospectively, but is instead "a result which must be obtained by the process of amending the Federal Rules." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

Second, requiring a plaintiff to set forth a constitutionally acceptable alternative would be antithetical to this Court's insistence that courts adjudicating § 1983 cases must preserve the discretion of state officials regarding how to change procedures in response to a finding of unconstitutionality. As this Court has explained, "strong considerations of comity . . . require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *See Lewis v. Casey*, 518 U.S. 343, 362-64 (1996). Rather than forcing a State to accept a § 1983 plaintiff's preferred procedure, the proper course is to "refrain[ ] from 'dictat[ing] precisely what course the State should follow'" and "'charg[ing] the Department of Correction with the task of devising a Constitutionally sound [alternative].'" *Id.* at 362 (quoting *Bounds v. Smith*, 430 U.S. 817, 818-19 (1977)). There is no reason why that principle of deference to state administrative discretion – which the

United States ignores – should apply any differently in the present context.

Third, the approach suggested by the United States would undermine the clarity and predictability of the established rule for deciding when cases must be brought in habeas. The application of that rule to Mr. Hill's complaint is straightforward. Because he does not challenge the fact or duration of his sentence or advance any claim that asserts its invalidity – indeed, his complaint expressly disclaims any contention that Florida is constitutionally forbidden to execute him by lethal injection – he is entitled to proceed under § 1983. What the United States proposes is that his claim be treated *as though* it were a "fact or duration" challenge because the practical effect of adjudicating it may be to delay his execution. The Court unanimously rejected exactly the same argument in *Nelson*. As *Nelson* explained, "focusing attention on whether petitioner's challenge . . . would *necessarily* prevent Alabama from carrying out its execution both protects against the use of § 1983 to circumvent any limits imposed by the habeas statute and minimizes the extent to which the fact of the prisoner's imminent execution will require differential treatment of his otherwise cognizable § 1983 claims." 541 U.S. at 647.[3]

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[3] In the face of this clear holding, there is no basis for the contention of the United States that "the fact of the prisoner's imminent execution" *should* be viewed as barring "his otherwise cognizable § 1983 claims." *Nelson* explained that the district courts' equitable authority under *Gomez* would suffice to police abuse (*see* note 1 *supra*) and that plaintiffs challenging execution procedures under § 1983 would be constrained by the requirements of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. *See Nelson*, 541 U.S. at 649-50. As *Nelson* indicates, there is no reason *also* to substitute *ad hoc* analysis of the kind the United States proposes for the clear rule of *Preiser* and its progeny.

Fourth, the United States is simply incorrect in its assertion that requiring inmates such as Mr. Hill to specify a constitutionally acceptable alternative is necessary to ensure that they do not thwart execution "by challenging individual methods of execution *seriatim*." U.S. Br. 16. As with any other § 1983 challenge, the State has two options when confronted with a claim that a particular execution procedure violates the Eighth Amendment: it can dispute the claim or it can propose an alternative that eliminates the basis for the objection. If the State chooses to defend the challenged procedure and the trial court upholds it, the court's judgment disposes of the litigation and the execution goes forward. If the State chooses to put forward an alternative procedure, either the inmate will agree (and the case will be disposed of by consent decree) or the case will be contested (and disposed of by court order). Either way, the challenge will be resolved in a manner that is no different from a case in which a plaintiff affirmatively pleads a specific alternative. Only if the State continues to put forward alternatives that the trial court finds to be unconstitutional will the litigation continue in *seriatim* fashion.[4]

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[4] Given the constitutional options available to the State for carrying out execution by lethal injection, *see, e.g., Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir.), *cert. denied*, 126 S. Ct. 1314 (2006), there is no reason to believe that *seriatim* challenges will prevent lawful executions. In *Morales*, for example, the district court determined that California's protocol did not comport with the Eighth Amendment unless modified in one of two critical respects. *See Morales*, 415 F. Supp. 2d at 1047-48. When the State modified the protocol in a manner consistent with the court's order, Morales challenged the revised protocol. The District Court rejected Morales's challenge, finding the protocol, as revised, constitutional. *See Morales v. Hickman*, No. 06-219JF (N.D. Cal. Feb. 16, 2006); *see also Baze v. Rees*, No. 04-CI-01094 (Ky. Cir. Ct. July 8, 2005) (finding

To be sure, in *Nelson*, the Court mentioned the alternative procedure alleged by the inmate in that case. But Nelson's allegations merely confirmed that he did not seek to challenge the validity of his death sentence, given that his complaint requested injunctive relief that could have been construed as barring his execution entirely. *See* 541 U.S. at 648; *see also id.* at 647 (questioning whether the prayer for relief "transformed his conditions of confinement claim into a challenge to the validity of his death sentence"). Where, as here, an inmate makes clear that the challenge is neither to the death sentence *per se* nor to the State's chosen method of lethal injection, but only to specific procedures, the inmate need not plead an alternative procedure to bring the claim within *Nelson*.[5]

II. THERE IS NO OTHER GROUND FOR DENYING MR. HILL ACCESS TO A § 1983 FORUM FOR HIS EIGHTH AMENDMENT CLAIM.

There is no merit to any of the remaining reasons advanced by respondents and the United States for denying

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jugular vein access unconstitutional but upholding lethal injection through peripheral vein access).

[5] Although the question of how to bring "general" method-of-execution claims is not presented here, the logic of this Court's cases suggests that such claims are congnizable under § 1983. In *Dotson* the Court made clear that the "implied exception" to § 1983's coverage is limited to claims that lie "within the core of habeas corpus," *Dotson*, 125 S. Ct at 1247 (internal quotation omitted), and in *Nelson*, this Court noted that method of execution challenges "fall at the margins of habeas," 541 U.S. at 646. Moreover, requiring "general" method of execution claims to be brought in habeas would force district courts to confront threshold issues as to whether a particular challenge is "general" or "specific," eschewing the clarity and efficiency that would result from adopting *Nelson*'s bright line for all method of execution claims.

Mr. Hill the right to pursue his Eighth Amendment claim in a § 1983 action.

1. The Eleventh Circuit cannot be affirmed on the ground that Mr. Hill failed to satisfy the requirement of the Prison Litigation Reform Act ("PLRA") that he exhaust administrative remedies before bringing his § 1983 action. Respondents do not raise exhaustion as an alternative ground for affirmance in this Court, and they have never suggested that administrative remedies are available to Mr. Hill. Because the requirement is not jurisdictional, it has been waived.[6] It certainly should not be considered at the behest of an *amicus* when the party defending the judgment has not raised it – especially where the *amicus* does not even try to identify the specific administrative procedure that Mr. Hill should have exhausted prior to filing his complaint.

Notably, Mr. Hill's complaint alleged that no administrative remedies were available to him. *See* J.A. 17-18. In response, the State alleged only that "Hill has not identified what administrative remedies he claims he has exhausted." J.A. 25 (citing 42 U.S.C. § 1997e(a)). The State did not identify any unexhausted procedures available to Mr. Hill. The PLRA's exhaustion requirement is not a rule of pleading the plaintiff must satisfy. It is an affirmative

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[6] *See Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 677 (4th Cir. 2005); *Richardson v. Goord*, 347 F.3d 431, 433-34 (2d Cir. 2003) (*per curiam*); *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1206 (10th Cir. 2003); *Ali v. Dist. of Columbia*, 278 F.3d 1, 5-6 (D.C.Cir.2002); *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir. 2002); *Wright v. Hollingsworth*, 260 F.3d 357, 358 n.2 (5th Cir. 2001); *Curry v. Scott*, 249 F.3d 493, 501 n.2 (6th Cir. 2001); *Chelette v. Harris*, 229 F.3d 684, 687 (8th Cir. 2000); *Nyhuis v. Reno*, 204 F.3d 65, 69 n.4 (3d Cir. 2000); *Rumbles v. Hill*, 182 F.3d *1064*, 1067-68 (9th Cir. 1999); *Massey v. Helman*, 196 F.3d 727, 732 (7th Cir. 1999).

defense *the defendant* must plead and prove.[7] Thus, the State forfeited the defense.[8]

2. Nor can the Eleventh Circuit be affirmed on the ground that Mr. Hill is disentitled to relief under *Gomez v. United States District Court for the Northern District of California*, 503 U.S. 653 (1992) (per curiam). To begin with, that is not a matter for this Court at the present juncture. It is a matter for the district court to consider on remand after this Court corrects the erroneous holding of both courts below that the district court lacked jurisdiction in the case. *See Nelson*, 541 U.S. at 648. As *Nelson* made clear, any equitable considerations are to be assessed by the district court in the first instance. *See* 541 U.S. at 649-50; *cf. Padilla v. Hanft*, __ S. Ct. __, No. 05-533, 2006 WL 845383, at *2 (Apr. 3, 2006) (Kennedy, J., concurring) (it is the province of

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[7] *See Anderson*, 407 F.3d at 681; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003); *Casanova v. Dubois*, 304 F.3d 75, 77 (1st Cir. 2002); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002); *Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001); *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999); *see also Johnson v. California*, 543 U.S. 499 (2005) (assuming that the PLRA's exhaustion requirement is waivable); *id.* at 528 n.1 (Thomas, J., dissenting) (pointing out assumption); *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C. Cir. 2001) (suggesting that exhaustion is an affirmative defense).

[8] Had respondents pleaded the defense in the district court, that court would have had to determine whether the State had in fact shown that Mr. Hill had administrative remedies available to him. *See Booth v. Churner*, 532 U.S. 731, 736 n.4 (2001) ("Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust."). Given that no one so far has even attempted to point this Court to any available administrative procedure, it is highly unlikely that the State could have made the requisite showing.

the district court, in the course of its supervision of a case, to guard against any abuses of the judicial system by the parties).

In any event, Mr. Hill diligently pursued his claim as soon as it ripened. His claim was not ripe before his death warrant issued, because it was only at that time that the Florida Department of Corrections ("DOC") was obliged to begin planning to conduct his execution, and only at that point that Mr. Hill could attempt to ascertain the specific means by which the State meant to carry out his lethal injection. *See Worthington v. Missouri*, 166 S.W. 3d 566, 583 n.3 (Mo. 2005). That is the case in Florida because the DOC retains complete discretion over how lethal injections will be carried out, and it shrouds its intentions in secrecy.

No statute specifies the chemicals or the injection sequence to be used, the procedures for performing the injection, any qualifications or training required for persons engaged in administering the chemicals and monitoring the execution, or the means of venous access.[9] Nor does the Florida lethal injection statute – or any other provision of Florida law – require that such procedures be devised through a rule-making process, or even in consultation with

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[9] In contrast, Florida prescribes, with careful detail, the chemicals to be used in animal euthanasia and the chemicals that are prohibited for such use (including any neuromuscular blocking agent); a strict "order of preference" for the manner in which the lethal solution is to be administered; the qualifications that a person administering the lethal solution must possess; and a 16-hour "euthanasia technician course" that anyone administering the lethal solution must have taken. *See* Fla. Stat. § 828.058. The statute goes on to detail the minimum topics that the certification course must cover (including pharmacology, proper administration and storage of euthanasia solutions) and the manner in which the curriculum for the course is to be approved (by the Board of Veterinary Medicine). *See id.* § 828.058(4)(a).

medical experts.[10] And the DOC itself has not published any stable set of procedures through rule-making or otherwise. The DOC retains total discretion to change at any time and with respect to any particular execution the chemical sequence, the manner of its administration, the qualifications and training of the execution team, and any provisions it might (or might not) adopt to ensure proper administration and adequate anesthetic depth.

The United States does not dispute that the DOC has total discretion in these regards. Instead, the United States suggests that Mr. Hill could not "presume" that the DOC would exercise that discretion prior to his execution and that he should instead be required to assume that the State would use the procedures revealed in litigation six years earlier in *Sims v. State*, 754 So.2d 657 (Fla. 2000). *See* U.S. Br. 26 n.9. That contention cannot be squared with this Court's ripeness doctrine.

The "central concern" of the ripeness doctrine "is whether the case involves uncertain or contingent future events that may not occur as anticipated." 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984). Accordingly, the ripeness inquiry looks to whether a sufficiently concrete and definitive agency policy or practice exists. Otherwise, judicial intervention would "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise." *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980). As this Court has explained in the analogous context of federal administrative review,

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[10] *Compare* Fla. Stat. § 828.055 (requiring the Board of Pharmacy to adopt rules for permits authorizing the use of chemicals in animal euthanasia, which "shall set forth guidelines for the proper storage and handling" of the chemicals); *id.* § 828.058 (requiring training for animal euthanasia technicians involving a curriculum approved by the Board of Veterinary Medicine).

> [T]he ripeness requirement is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (citation omitted).

Here, rather than promulgate a definitive policy, the DOC has retained total discretion. For this reason, it was only when Mr. Hill's execution was imminent that he could attempt to ascertain what procedures would be used to execute him. Significantly, the DOC even then refused to disclose its execution protocol, and Florida's lawyers successfully opposed Mr. Hill's efforts to obtain the protocol through public-records requests and other state-court discovery procedures, which requests the Florida Supreme Court did not finally deny until January 17, 2006. *See* Pet'r Br. 8-9. The State cannot fight tooth and nail to resist publication of any definitive protocol and then accuse a condemned person of inequitable conduct because he must wait until his death warrant is issued to ascertain the particular procedures that will be used in his execution.

The State could, however, secure an earlier resolution of any challenges to its execution procedures simply by the orderly adoption of rules and their public disclosure. The DOC could then properly insist that the question whether its chosen procedures for administering lethal injection violate the Eighth Amendment be adjudicated before any individual inmate's date of execution is set.

Given the lack of *any* constraints on the DOC's discretion and the absence of any authoritative procedures that would

have provided the courts with a sufficiently concrete lethal injection process to review before Mr. Hill's execution warrant issued and the DOC began its preparations to execute him, Mr. Hill's claim did not ripen until that time. And from that moment forward, Mr. Hill diligently pursued his claim. Mr. Hill initially filed suit in state court, in order to defend against an argument that he had failed to exhaust state remedies.[11] As soon as his action was dismissed on procedural grounds in state court, he immediately filed his § 1983 action.

III. MR. HILL CANNOT BE DENIED A FORUM ON THE THEORY THAT HIS SUIT SHOULD BE RECHARACTERIZED AS A SUCCESSIVE HABEAS PETITION.

There is also no merit to the contention by respondents and some of their *amici* that Mr. Hill's § 1983 complaint would be subject to dismissal as a "second or successive" habeas petition if it were recharacterized as a habeas pleading. Thus, even apart from *Nelson v. Campbell*, there is no conceivable justification for concluding that his § 1983 claim is an impermissible end-run around the limitations on habeas jurisdiction.

1. To begin with, the suggestion of the United States that this question ought not be considered by the Court is indefensible. Respondents did not raise any objection to its consideration and fully briefed the question (as did the State *amici*). That should be dispositive. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 260 (1987) (refusing to reach claim

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[11] Although Mr. Hill was not required to exhaust state-court remedies prior to bringing his federal-court action under § 1983, *see Dotson*, 125 S. Ct. at 1249, he did so out of an abundance of caution, recognizing that if the district court were to construe his complaint as a habeas filing, he *would* have had to exhaust those judicial remedies, *see* 28 U.S.C. § 2254(b)(1)(A).

only because respondent objected "at the first point that she was on notice that it was at issue"). In any event, both the district court and the Eleventh Circuit squarely addressed the question below. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). The district court held that the petition was "the functional equivalent of a successive petition for writ of habeas corpus" and that petitioner "should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition." J.A. 15. The court of appeals affirmed, holding that "the district court lacked jurisdiction to consider [Mr. Hill's] claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it." J.A. 10.

Moreover, the issue was fairly presented in the petition for certiorari. The petition characterized the Eleventh Circuit as holding that "[a]ny challenge amounts to a successive habeas petition," Pet. at 14-15, and it quoted the court of appeals' holding that Mr. Hill's claim was successive, *see id.* at 14-15.

Finally, this issue is "inextricably linked" to the questions that all concede are presented. Invoking *Preiser*, respondents and the United States contend that Mr. Hill's § 1983 claim should be foreclosed because it is an attempt to avoid the restrictions on habeas jurisdiction. That contention invites inquiry into whether in fact the claim would be precluded in habeas. Thus, there is no justification for refusing to conduct the inquiry. *See Missouri v. Jenkins*, 515 U.S. 70, 84-86 (1995); *cf. City of Sherrill v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478, 1490, n.8 (2005); *Ballard v. Commissioner*, 125 S. Ct. 1270, 1275, n.2 (2005).

2. On the merits, lacking any case law to support their position, respondents and the United States contend first that Mr. Hill's claims are barred by the plain language of AEDPA. Specifically, they assert that because Mr. Hill's claim is "successive," it must satisfy both conditions set forth

in § 2244(b)(2)(B), *i.e.*, that the factual predicate for the claim could not have been discovered previously and that the claim must demonstrate Mr. Hill's innocence. *See* U.S. Br. 21-22; Fla. Br. 34-36. But that argument assumes its conclusion. AEDPA's textual conditions apply only to "second or successive" petitions. They do not define (or even purport to define) what constitutes a second or successive petition.

Slack and *Martinez-Villareal* make that distinction clear. In neither case could the habeas petitioners satisfy *either* condition of § 2244(b)(2)(B). Yet the Court allowed the claims to proceed, holding that the petitions at issue, although numerically second or successive, were not "second or successive" within the meaning of AEDPA. In *Slack*, the Court held that "[a] petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other petition' and *is not a second or successive petition*." 529 U.S. at 487 (emphasis added). Similarly, the Court held in *Martinez-Villareal* that "respondent's *Ford* claim *was not a 'second or successive' petition* under § 2244(b)." 523 U.S. at 645.

These decisions are dispositive of the question whether Mr. Hill's claim is "second or successive" within the meaning of AEDPA. Although the United States is correct that those cases did not technically decide the precise issue presented here, they leave no doubt about how the issue here should be resolved. *Martinez-Villareal* permits the adjudication of a claim that ripened only after the first federal petition was denied. The United States suggests that the Court simply held that petitioner was entitled to an adjudication of all the claims presented in his first petition. That is not accurate. The petitioner in *Martinez-Villareal* received an adjudication of all claims in his first petition – the *Ford* claim was properly dismissed as unripe. What the Court actually held was that petitioner was entitled to a re-

adjudication of his claim on the merits once it had ripened, which is all that Mr. Hill seeks here.

Slack likewise did more than merely hold that a petition re-filed after dismissal of a so-called "mixed" petition is not a "second" petition – it also adopted pre-AEDPA case law as the base-line for defining "second or successive." Justice Kennedy's opinion stated unambiguously that "[t]he phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases," 529 U.S. at 486, and neither the United States nor Florida contends that, under this Court's "prior habeas corpus cases," Mr. Hill's petition would be successive. It is thus unsurprising that the courts of appeals have consistently relied on *Martinez-Villareal* and *Slack* to reject the precise position the United States advances here. *See* Pet'r Br. 35-36. *Cf. Johnson v. United States*, 125 S. Ct. 1571, 1579 (2005) (rejecting an interpretation of AEDPA under which "the statute of limitations may begin to run (and even expire) before the § 2255 claim and its necessary predicate even exist").

Even if *Slack* and *Martinez-Villareal* left any doubt on the matter, there is little to recommend the approach advanced by the United States (and, as noted, no case law to support it). On this view, to avoid forfeiting federal review of an Eighth Amendment claim every habeas petitioner must include in his first federal petition a challenge to every conceivable method of execution. Thus, Mr. Hill would have to have challenged not only the gas chamber, hanging, and lethal injection (even though electrocution was Florida's chosen method of execution), but also (for example) every possible combination of chemicals that could be used to implement lethal injection, or risk having all of those challenges lost forever. Similarly, every prisoner, whether mentally competent or not, would have to raise a plainly unripe *Ford* claim to guard against the possibility that he or she will become incompetent by the time of his execution

(when the claim first ripens). And prisoners would have to anticipate a host of other claims that might arise after first federal habeas was over, such as claims under *Brady v. Maryland*, 373 U.S. 83 (1963), which often arise after initial federal habeas proceedings are completed (*see, e.g.*, *Banks v. Dretke*, 540 U.S. 668 (2004)). Why Congress would have wanted to clutter first federal habeas petitions with such an array of hypothetical and unripe claims as a precondition for their later adjudication once they had ripened is never explained.

Moreover, as noted in Mr. Hill's opening brief, such an argument is at odds with this Court's prior understanding of second or successive petitions, which does not require the futile act of filing an unripe claim merely to preserve it for later. Pet'r Br. at 33-34. The United States chides Mr. Hill for relying on those pre-AEDPA decisions, but (as noted above) this Court squarely held that AEDPA used "second or successive petition" as a "term of art" that drew substance from "our prior habeas corpus cases." 529 U.S. at 486. Given that AEDPA itself contains no definition of "second or successive," it is hardly surprising that the Court looked to its prior decisions.

In truth, respondents and the United States do not seek to apply *Slack* and *Martinez-Villareal* faithfully, but instead seek to repackage the dissents in those cases as the holdings of the Court. But the Court squarely rejected the contention that all claims that are numerically second or successive are governed by AEDPA's rules for "second or successive" petitions and adopted a more flexible understanding informed by pre-AEDPA case law. Congress could have overturned that interpretation if it had wanted to do so, but it has not. There is no basis for departing from those decisions now.

3. Bereft of a convincing argument to support the Eleventh Circuit's dismissal of Mr. Hill's habeas petition on jurisdictional grounds, the United States – but not

respondents – urges this Court to dismiss the claim as barred by AEDPA's statute of limitations. *See* U.S. Br. 24-27 (invoking 28 U.S.C. § 2244(d)(1)). That position, which has not been raised by any court or party throughout this litigation, provides no basis for resolving the petition here.

The limitations defense is not jurisdictional. It is an affirmative defense that ordinarily must be pled and is subject to waiver. The State has not raised the defense at any stage of this case. It would be altogether inappropriate for this Court to take up the defense at the request of an *amicus* when the State has chosen not to raise it.[12]

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[12] In *Day v. McDonough*, 04-1324 (argued Feb. 27, 2006), this Court is considering a district court's authority to dismiss a habeas petition on limitations grounds even when the State has waived the issue. Should the petitioner in *Day* prevail, the argument of the United States here would necessarily fail as well.

But even if a court *may* in some cases dismiss on limitations grounds in the face of a State's waiver, it would be inappropriate for this Court to exercise that sort of discretion in the first instance on the present record. Among other things, limitations defenses such as those raised by the *amicus* often turn on an intensely factual analysis. *Compare* Pet'r Br. at 45-50, *Day v. Crosby*, No. 04-1324 (U.S. filed Nov. 30, 2005) (no disputed facts with respect to tolling of limitations provision). Mr. Hill's case, for example, presents a strong case for equitable tolling, which the courts of appeals have agreed applies to AEDPA's limitations provisions. When there are facts to be determined and equities to be weighed, resolution by this Court on a motion to dismiss is inappropriate, particularly when neither party has fully briefed the issue. *See Lance v. Dennis*, 126 S. Ct. 1198, 1203 (2006) (per curiam) (reversing jurisdictional holding but remanding for district court to address preclusion arguments in the first instance); *id.* (Ginsburg, J., concurring) (noting that preclusion is "best left for full airing and decision on remand").

In any event, the statute of limitations does not justify dismissal, for reasons discussed earlier in this Reply. In Mr. Hill's situation, "the date on which the factual predicate of the claim . . . presented could have been discovered through the exercise of due diligence," § 2244(d)(1)(D), is the same as the date on which the claim ripened: the date when Mr. Hill's execution warrant issued. Mr. Hill's claim was thus timely when filed, and § 2244(d)(1)(D) affords no basis for dismissing the petition.

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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April 17, 2006

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HILL *v.* McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05–8794. Argued April 26, 2006—Decided June 12, 2006

Facing execution in Florida, petitioner Hill brought this federal action under 42 U. S. C. §1983 to enjoin the three-drug lethal injection procedure the State likely would use on him. He alleged the procedure could cause him severe pain and thereby violate the Eighth Amendment's prohibition of cruel and unusual punishments. The District Court found that under controlling Eleventh Circuit precedent the §1983 claim was the functional equivalent of a habeas petition. Because Hill had sought federal habeas relief earlier, the court deemed his petition successive and barred under 28 U. S. C. §2244. The Eleventh Circuit agreed and affirmed.

Held: Because Hill's claim is comparable in its essentials to the §1983 action the Court allowed to proceed in *Nelson* v. *Campbell*, 541 U. S. 637, it does not have to be brought in habeas, but may proceed under §1983. Pp. 4–10.

(a) *Nelson* controls here. Although an inmate's challenge to the lawfulness of a sentence or confinement is the province of habeas corpus, *e.g.*, *Muhammad* v. *Close*, 540 U. S. 749, 750, the *Nelson* Court declined to deem the instant §1983 Eighth Amendment "challenge seeking to permanently enjoin the use of lethal injection . . . a challenge to the fact of the sentence itself," 541 U. S., at 644. Nelson's veins were severely compromised, and Alabama planned to apply an invasive surgical procedure to enable the injection. However, that procedure was not mandated by state law, and Nelson appeared willing to concede the existence of an acceptable alternative procedure. Absent a finding that the procedure was necessary to the lethal injection, the Court concluded, injunctive relief would not prevent the State from implementing the sentence. *Id.*, at 645–646. Here, as in *Nelson*,

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Hill's action if successful would not necessarily prevent the State from executing him by lethal injection. He does not challenge his sentence as a general matter but seeks only to enjoin respondents from executing him in a manner that allegedly causes a foreseeable risk of gratuitous and unnecessary pain. He concedes that other lethal injection methods the State could choose would be constitutional, and respondents do not contend, at least at this point, that an injunction would leave no other practicable, legal method of lethally injecting Hill. Florida law, moreover, does not require the use of the challenged procedure. Under these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence. The fact that Hill challenges the chemical injection sequence rather than a preliminary surgical procedure does not change the analysis. In *Nelson*, the Court reasoned that "the gravamen of petitioner's entire claim" was that the surgical procedure was "gratuitous," *id.*, at 645, whereas Hill alleges that the procedure he challenges presents a risk of pain the State can avoid while still being able to enforce his sentence.

The Court rejects two rules proposed by respondents and their *amici* to counter the prospect of inmates filing successive §1983 actions challenging one aspect of an execution procedure after another in order to forestall execution. First, the United States contends that a capital litigant's §1983 action can proceed only if, as in *Nelson*, the prisoner identifies an alternative, authorized method of execution. Although Nelson's doing so supported the Court's conclusion that his suit need not proceed as a habeas action, that fact was not decisive. *Nelson* did not change the traditional pleading requirements for §1983 actions. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through federal courts' case-by-case determinations. Second, relying on cases barring §1983 damages actions that, if successful, would imply the invalidation of an existing sentence or confinement, see, *e.g.*, *Heck* v. *Humphrey*, 512 U. S. 477, respondents and the *amici* States contend that any challenge that would frustrate an execution as a practical matter must proceed in habeas. This argument cannot be squared with *Nelson*'s observation, 541 U. S., at 646–647, that its criterion—whether granting relief would necessarily bar the inmate's execution—is consistent with those cases. Because injunctive relief would not necessarily foreclose Florida from executing Hill by lethal injection under present law, it could not be said that this suit seeks to establish "unlawfulness [that] would render a conviction or sentence invalid," *Heck*, *supra*, at 486. Pp. 4–9.

(b) Filing a §1983 action does not entitle the complainant to an automatic stay of execution. Such a stay is an equitable remedy not

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available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from federal courts. Thus, inmates seeking time to challenge the manner of their execution must satisfy all of the requirements for a stay, including showing a significant possibility of success on the merits. A court considering a stay must also apply a strong equitable presumption against granting relief where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay. *Nelson, supra*, at 650. After *Nelson* federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late. Repetitive or piecemeal litigation presumably would raise similar concerns. States can and should be protected from dilatory or speculative suits, but it is not necessary to reject *Nelson* to do so. The equities and merits of Hill's underlying action are not before this Court. Pp. 9–10.

437 F. 3d 1084, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–8794

CLARENCE E. HILL, PETITIONER *v.* JAMES R. McDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 12, 2006]

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner Clarence E. Hill challenges the constitutionality of a three-drug sequence the State of Florida likely would use to execute him by lethal injection. Seeking to enjoin the procedure, he filed this action in the United States District Court for the Northern District of Florida, pursuant to the Civil Rights Act of 1871, Rev. Stat. §1979, as amended, 42 U. S. C. §1983. The District Court and the Court of Appeals for the Eleventh Circuit construed the action as a petition for a writ of habeas corpus and ordered it dismissed for noncompliance with the requirements for a second and successive petition. The question before us is whether Hill's claim must be brought by an action for a writ of habeas corpus under the statute authorizing that writ, 28 U. S. C. §2254, or whether it may proceed as an action for relief under 42 U. S. C. §1983.

This is not the first time we have found it necessary to discuss which of the two statutes governs an action brought by a prisoner alleging a constitutional violation.

See, *e.g.*, *Nelson* v. *Campbell*, 541 U. S. 637 (2004); *Heck* v. *Humphrey*, 512 U. S. 477 (1994); *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973). Hill's suit, we now determine, is comparable in its essentials to the action the Court allowed to proceed under §1983 in *Nelson*, *supra*. In accord with that precedent we now reverse.

I

In the year 1983, Hill was convicted of first-degree murder and sentenced to death. When his conviction and sentence became final some five years later, the method of execution then prescribed by Florida law was electrocution. Fla. Stat. §922.10 (1987). On January 14, 2000—four days after the conclusion of Hill's first, unsuccessful round of federal habeas corpus litigation—Florida amended the controlling statute to provide: "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." §922.105(1) (2003). The now-controlling statute, which has not been changed in any relevant respect, does not specify a particular lethal-injection procedure. Implementation is the responsibility of the Florida Department of Corrections. See *ibid.*; *Sims* v. *State*, 754 So. 2d 657, 670 (Fla. 2000) *(per curiam)*. The department has not issued rules establishing a specific lethal-injection protocol, and its implementing policies and procedures appear exempt from Florida's Administrative Procedure Act. See §922.105(7).

After the statute was amended to provide for lethal injection, the Florida Supreme Court heard a death row inmate's claim that the execution procedure violated the Eighth Amendment's prohibition of cruel and unusual punishments. *Sims* v. *State*, *supra*. In *Sims*, the complainant, who had acquired detailed information about the procedure from the State, contended the planned three-drug sequence of injections would cause great pain if the

drugs were not administered properly. 754 So. 2d, at 666–668. The Florida Supreme Court rejected this argument as too speculative. *Id.*, at 668.

On November 29, 2005, the Governor of Florida signed Hill's death warrant, which ordered him to be executed on January 24, 2006. Hill requested information about the lethal injection protocol, but the department provided none. App. 21, n. 3 (Verified Complaint for Declaratory & Injunctive Relief ¶15, n. 3 (hereinafter Complaint)). Hill then challenged, for the first time, the State's lethal injection procedure. On December 15, 2005, he filed a successive postconviction petition in state court, relying upon the Eighth Amendment. The trial court denied Hill's request for an evidentiary hearing and dismissed his claim as procedurally barred. The Florida Supreme Court affirmed on January 17, 2006. *Hill* v. *State*, 921 So. 2d 579, cert. denied, 546 U. S. ___ (2006).

Three days later—and four days before his scheduled execution—Hill brought this action in District Court pursuant to 42 U. S. C. §1983. Assuming the State would use the procedure discussed at length in the *Sims* decision, see App. 20–21, and n. 3 (Complaint ¶15, n. 3), Hill alleged that the first drug injected, sodium pentothal, would not be a sufficient anesthetic to render painless the administration of the second and third drugs, pancuronium bromide and potassium chloride. There was an ensuing risk, Hill alleged, that he could remain conscious and suffer severe pain as the pancuronium paralyzed his lungs and body and the potassium chloride caused muscle cramping and a fatal heart attack. *Id.*, at 18–21 (Complaint ¶¶9–16). The complaint sought an injunction "barring defendants from executing Plaintiff in the manner they currently intend." *Id.*, at 22 (Complaint ¶¶19–20).

The District Court found that under controlling Eleventh Circuit precedent the §1983 claim was the functional equivalent of a petition for writ of habeas corpus. *Id.*, at

15 (relying on *Robinson* v. *Crosby*, 358 F. 3d 1281 (2004)). Because Hill had sought federal habeas corpus relief in an earlier action, the District Court deemed his petition successive and thus barred for failure to obtain leave to file from the Court of Appeals as required by 28 U. S. C. §2244(b). On the day of the scheduled execution the Court of Appeals affirmed. It held that Hill's action was a successive petition and that it would deny any application for leave to file a successive petition because §2244(b)(2) would not allow his claim to proceed. *Hill* v. *Crosby*, 437 F. 3d 1084, 1085 (CA11 2006). After issuing a temporary stay of execution, this Court granted Hill's petition for certiorari and continued the stay pending our resolution of the case. 546 U. S. ___ (2006).

II

"Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U. S. C. §2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. §1979, as amended, 42 U. S. C. §1983. Challenges to the lawfulness of confinement or to particulars affecting its duration are the province of habeas corpus." *Muhammad* v. *Close*, 540 U. S. 749, 750 (2004) *(per curiam)* (citing *Preiser, supra*, at 500). An inmate's challenge to the circumstances of his confinement, however, may be brought under §1983. 540 U. S., at 750.

In *Nelson* v. *Campbell, supra*, we addressed whether a challenge to a lethal injection procedure must proceed as a habeas corpus action. The complainant had severely compromised peripheral veins, and Alabama planned to apply an invasive procedure on his arm or leg to enable the injection. He sought to enjoin the procedure, alleging it would violate the Eighth Amendment. The Court observed that the question whether a general challenge to a method of execution must proceed under habeas was a

difficult one. The claim was not easily described as a challenge to the fact or duration of a sentence; yet in a State where the legislature has established lethal injection as the method of execution, "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." *Id.*, at 644.

Nelson did not decide this question. The lawsuit at issue, as the Court understood the case, did not require an injunction that would challenge the sentence itself. The invasive procedure in *Nelson* was not mandated by law, and the inmate appeared willing to concede the existence of an acceptable alternative procedure. *Id.*, at 645–646. Absent a finding that the challenged procedure was necessary to the lethal injection, the Court concluded, injunctive relief would not prevent the State from implementing the sentence. Consequently, the suit as presented would not be deemed a challenge to the fact of the sentence itself. See *ibid.*

The decision in *Nelson* also observed that its holding was congruent with the Court's precedents addressing civil rights suits for damages that implicate habeas relief. Those cases provide that prisoners' suits for damages can be barred from proceeding under §1983 when a judgment in the prisoner's favor necessarily implies the invalidity of the prisoner's sentence. See, *e.g.*, *Heck*, 512 U. S., at 487; *Close*, *supra*, at 751. The action in *Nelson*, however, was not analogous to a damages suit filed to circumvent the limits imposed by the habeas statute. The suit did not challenge an execution procedure required by law, so granting relief would not imply the unlawfulness of the lethal injection sentence. See 541 U. S., at 647.

In the case before us we conclude that Hill's §1983 action is controlled by the holding in *Nelson*. Here, as in *Nelson*, Hill's action if successful would not necessarily prevent the State from executing him by lethal injection.

The complaint does not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin the respondents "from executing [Hill] in the manner they currently intend." App. 22 (Complaint ¶20). The specific objection is that the anticipated protocol allegedly causes "a foreseeable risk of . . . gratuitous and unnecessary" pain. *Id.*, at 46 (Application for Stay of Execution and for Expedited Appeal). Hill concedes that "other methods of lethal injection the Department could choose to use would be constitutional," Brief for Petitioner 17, and respondents do not contend, at least to this point in the litigation, that granting Hill's injunction would leave the State without any other practicable, legal method of executing Hill by lethal injection. Florida law, moreover, does not require the Department of Corrections to use the challenged procedure. See Fla. Stat. §§922.105(1), (7) (prescribing lethal injection and leaving implementation to the Department of Corrections). Hill's challenge appears to leave the State free to use an alternative lethal injection procedure. Under these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence.

One difference between the present case and *Nelson*, of course, is that Hill challenges the chemical injection sequence rather than a surgical procedure preliminary to the lethal injection. In *Nelson*, however, the State argued that the invasive procedure was not a medical operation separable from the lethal injection but rather a "necessary prerequisite to, and thus an indispensable part of, any lethal injection procedure." 541 U. S., at 645. The Court reasoned that although venous access was necessary for lethal injection, it did not follow that the State's chosen means of access were necessary; "the gravamen of petitioner's entire claim" was that the procedure was "gratuitous." *Ibid.* (emphasis deleted). The same is true here. Although the injection of lethal chemicals is an obvious

necessity for the execution, Hill alleges that the challenged procedure presents a risk of pain the State can avoid while still being able to enforce the sentence ordering a lethal injection.

One concern is that the foregoing analysis may be more theoretical than real based on the practicalities of the case. A procedure that avoids the harms Hill alleges, for instance, may be susceptible to attack for other purported risks of its own. Respondents and their supporting *amici* thus contend that the legal distinction between habeas corpus and §1983 actions must account for the practical reality of capital litigation tactics: Inmates file these actions intending to forestall execution, and *Nelson*'s emphasis on whether a suit challenges something "necessary" to the execution provides no endpoint to piecemeal litigation aimed at delaying the execution. Viewed in isolation, no single component of a given execution procedure may be strictly necessary, the argument goes, and a capital litigant may put off execution by challenging one aspect of a procedure after another. The *amici* States point to *Nelson*'s aftermath as a cautionary example, contending that on remand the District Court allowed Nelson to amend his complaint and that litigation over the constitutionality of Alabama's adopted alternative—one that Nelson had previously proposed—continues to this day. See Brief for the State of Alabama et al. 7–14.

Respondents and their supporting *amici* conclude that two different rules should follow from these practical considerations. The United States as *amicus curiae* contends that a capital litigant's §1983 action can proceed if, as in *Nelson*, *supra*, at 646, the prisoner identifies an alternative, authorized method of execution. A suit like Hill's that fails to do so, the United States maintains, is more like a claim challenging the imposition of any method of execution—which is to say, the execution itself—because it shows the complainant is unable or un-

willing to concede acceptable alternatives "[e]xcept in the abstract." Brief for United States 14.

Although we agree courts should not tolerate abusive litigation tactics, see Part III, *infra*, even if the United States' proposed limitation were likely to be effective we could not accept it. It is true that the *Nelson* plaintiff's affirmative identification of an acceptable alternative supported our conclusion that the suit need not proceed as a habeas action. 541 U. S., at 646 (citing the inmate's complaint and affidavits). That fact, however, was not decisive. *Nelson* did not change the traditional pleading requirements for §1983 actions. If the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper. See *id.*, at 644, 646. Cf. *Gonzalez* v. *Crosby*, 545 U. S. ___ (2005). Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts. See Fed. Rules Civ. Proc. 8 and 9; *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 512–514 (2002).

Respondents and the States as *amici* frame their argument differently. While not asking the Court in explicit terms to overrule *Nelson*, they contend a challenge to a procedure implicating the direct administration of an execution must proceed as a habeas action. Brief for Respondents 30–31; Brief for the State of Alabama et al. 16–18. They rely on cases barring §1983 damages actions that, if successful, would imply the invalidation of an existing sentence or confinement. See, *e.g.*, *Edwards* v. *Balisok*, 520 U. S. 641 (1997); *Heck*, 512 U. S. 477. Those cases, they contend, demonstrate that the test of whether an action would undermine a sentence must "be applied functionally." Brief for the State of Alabama et al. as *Amici Curiae* 16. By the same logic, it is said, a suit

should be brought in habeas if it would frustrate the execution as a practical matter.

This argument cannot be squared with *Nelson*'s observation that its criterion—whether a grant of relief to the inmate would necessarily bar the execution—is consistent with *Heck*'s and *Balisok*'s approach to damages actions that implicate habeas relief. *Nelson, supra,* at 646–647. In those cases the question is whether "the nature of the challenge to the procedures could be such as necessarily to imply the invalidity" of the confinement or sentence. *Balisok, supra,* at 645. As discussed above, and at this stage of the litigation, the injunction Hill seeks would not necessarily foreclose the State from implementing the lethal injection sentence under present law, and thus it could not be said that the suit seeks to establish "unlawfulness [that] would render a conviction or sentence invalid." *Heck, supra,* at 486. Any incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action.

III

Filing an action that can proceed under §1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. *Calderon* v. *Thompson*, 523 U. S. 538, 556 (1998). Our conclusions today do not diminish that interest, nor do they deprive federal courts of the means to protect it.

We state again, as we did in *Nelson*, that a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. 541 U. S., at 649–650. See *In re Blodgett*, 502 U. S. 236, 239–240 (1992)

(per curiam); Delo v. *Stokes*, 495 U. S. 320, 323 (1990) *(per curiam)* (KENNEDY, J., concurring). Thus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. See *Barefoot* v. *Estelle*, 463 U. S. 880, 895–896 (1983). See also *Mazurek* v. *Armstrong*, 520 U. S. 968, 972 (1997) *(per curiam)* (preliminary injunction not granted unless the movant, by a clear showing, carries the burden of persuasion).

A court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson, supra*, at 650. See also *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) *(per curiam)* (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

After *Nelson* a number of federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day. See, *e.g.*, *Hicks* v. *Taft*, 431 F. 3d 916 (CA6 2005); *White* v. *Johnson*, 429 F. 3d 572 (CA5 2005); *Boyd* v. *Beck*, 404 F. Supp. 2d 879 (EDNC 2005). Although the particular determinations made in those cases are not before us, we recognize that the problem they address is significant. Repetitive or piecemeal litigation presumably would raise similar concerns. The federal courts can and should protect States from dilatory or speculative suits, but it is not necessary to reject *Nelson* to do so.

The equities and the merits of Hill's underlying action are also not before us. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.